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IN THE

SUPREME COURT OF THE UNITED STATES

1974-75 TERM

No. 75-76

STATE OF SOUTH DAKOTA,

Petitioner

vs.

DONALD OPPERMAN,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

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INDEX

Page

I. OPINION BELOW 2
II. GROUND ON WHICH JURISDICTION IS INVOKED 2
III. QUESTION PRESENTED 2
IV. CONSTITUTIONAL PROVISIONS INVOLVED . . . 2
V. STATEMENT OF THE CASE 2
VI. REASONS FOR GRANTING CERTIORARI 4
A. THE JUDGMENT BELOW IS IN CONFLICT WITH THE DECISIONS OF THIS COURT . . . 4

B. THERE IS A CONFLICT BETWEEN THE STATE COURTS CONCERNING THE QUESTION PRESENTED 6

C. THERE IS A CONFLICT AMONG THE FEDERAL COURTS OF APPEAL— ON THE QUESTION PRESENTED 9

VII. CONCLUSION 10

APPENDIX A. Opinion of the South Dakota Supreme Court 11
B. Ruling of the South Dakota Circuit Court 28

CASES

Boulet v. State, 17 Ariz. App. 64, 496 P. 2d 504 (1972) . .7, 8
Cabbler v. Commonwealth, 212 Va. 520, 184 S.E. 2d 781 (1971) 7
Cady v. Dombrowski, 413 U.S. 433, (1973) 4, 5
Cady v. Dombrowski, 471 F. 2d 280 (7th Cir. 1974), reversed, 413 U.S. 433 (1973) 9
Carey v. Gammons, 475 F. 2d 1397 (3rd Cir. 1973), judgment vacated, 414 U.S. 807 (1973) 6, 9

INDEX

Page

City of St. Paul v. Myles, 218 N.W. 2d 697 (Minn. 1974) . . . 7
Coolidge v. New Hampshire, 403 U.S. 443, 466 5
Cooper v. California, 386 U.S. 58 (1967) 4, 5, 7
Dixon v. State, 16 Crim. L.R. 2140 (Md. Spec. App. 1974) . 7
Embree v. State, 488 P. 2d 588 (Okl. Cr. 1971) 7
Fruit v. State ___ Ok. Cr. App. ___, 16 Crim. L.R. 2197 (1974) 8
Godbee v. State, 224 So. 2d 441 (Fla. App. 1969) 7
Gravitt v. United States, 484 F. 2d 375 (5th Cir. 1973) cert. denied 414 U.S. 1135 (1974) 6
Harris v. The United States, 390 U.S. 234 (1968) 4, 5
Heffley v. Hocker, 420 F. 2d 881 (9th Cir. 1969) judgment vacated, 399 U.S. 521 (1970) 6, 9
Heffley v. State, 83 Nev. 100, 423 P. 2d 666 (1967) 7, 8
Mayfield v. United States, 276 A. 2d 123 (D.C. App. 1971) . 7
Mozetti v. Superior Court of Sacramento County, 4 Cal. 3d 699, 94 Cal. Rptr. 412, 484 P. 2d 84 (1971) 7, 8
People v. Sullivan, 29 N.Y. 2d 69, 323 N.Y.S. 2d 945, 272 N.W. 2d 464 (1971) reversing, 35 A.D. 2d 690, 315 N.Y.S. 2d 274 (1970) 7
People v. Trusty, ___ Colo. ___, 516 P. 2d 123 (1973) 7
People v. Willis, ___ Mich. ___, 208 N.W. 2d 204 (1973) . .7, 8
St. Clair v. State, 11 Md. App. 605, 232 A. 2d 565 (1967) . . 7
State v. Achter, ___ Mo. ___, 512 S.W. 2d 894 (1974) 7
State v. Bradshaw, 41 Ohio App. 2d 48, 322 N.W. 2d 311 (1974) 7, 8
State v. Criscola, 21 Utah 2d 272, 444 P. 2d 517 (1968) . . . 7
State v. Gowans, 18 Ariz. App. 110, 500 P. 2d 641 (1972) . . 8
State v. Gwinn, ___ Del. ___, 301 A. 2d 291 (1973) 7, 8
State v. Montague, 73 Wash. 2d 381, 438 P. 2d 571 (1968) 7, 8
State v. Nemrod, ___ N.M. ___, 509 P. 2d 885 (1973) 7
State v. Raiford, 7 Or. App. 302, 490 P. 2d 1936 (1971) . . . 7

INDEX

Page

State v. Wallen, 185 Nebr. 44, 173 N.W. 2d 372 (1970) . .7, 8
Thomas v. Washington, unreported, summary at 41 L.W. 3478, cert denied 413 U.S. 921 (1973) 6
United States v. Capra, 501 F. 2d 267 (2nd Cir. 1974) 9
United States v. Davis, 496 F. 2d 1026 (5th Cir. 1974) 8
United States v. Fuller, 433 F. 2d 533 (D.C. Cir. 1970) . . . 9
United States v. Lawson, 487 F. 2d 468 (8th Cir. 1973) . . . 8
United States v. Lipscomb, 435 F. 2d 795 (5th Cir. 1970), cert. denied 401 U.S. 980 (1971) 6
United States v. McDevitt, 508 F. 2d 8 (10th Cir. 1974) . . . 9
United States v. Mitchell, 458 F. 2d 960 (9th Cir. 1972) . . . 9
United States v. Pennington, 441 F. 2d 249 (5th Cir. 1971), cert. denied 404 U.S. 854 (1971) 6, 9
United States v. Robbins, 424 F. 2d 57 (5th Cir. 1970), cert. denied 402 U.S. 985 (1971) 6
United States v. Roe, 495 F. 2d 600 (10th Cir. 1974) 9
United States v. Sifventes, 504 F. 2d 845 (4th Cir. 1974) . . 9
Warrix v. State, 50 Wis. 2d 368, 184 N.W. 2d 181 (1971) . . 7

FEDERAL STATUTES

28 U.S.C. § 1257 (3) 2

IN THE

SUPREME COURT OF THE

UNITED STATES

1974-1975 Term

No._____

STATE OF SOUTH DAKOTA,

Petitioner,

vs.

DONALD OPPERMAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

Petitioner, the State of South Dakota, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of South Dakota entered in this proceeding on April 15, 1975.

I. OPINION BELOW

The opinion of the Supreme Court of South Dakota is reported at 228 N.W. 2d 152 (1975) and is attached hereto as Appendix A. The South Dakota trial court made an oral ruling from the bench on the Motion to Suppress which presented the legal issue involved in this Petition. A transcript of this oral ruling is attached hereto as Appendix B.

II. GROUND ON WHICH JURISDICTION IS INVOKED

The judgment of the South Dakota Supreme Court was entered on April 15, 1975. This Petition for Writ of Certiorari was filed within ninety (90) days of that date. The jurisdiction of this court is invoked under 28 U.S.C. 1257(3).

III. QUESTION PRESENTED

Whether the South Dakota Supreme Court erred in holding inadmissible evidence found in the glove compartment of a vehicle during a lawful inventory of the contents of the vehicle by police, which inventory followed the impoundment of the vehicle for parking violations, on the ground that the inventory was an illegal search under the Fourth Amendment of the United States Consitution.

IV. CONSTITUTIONAL PROVISIONS INVOLVED

The federal constitutional provision involved is the Fourth Amendment of the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

V. STATEMENT OF THE CASE

During the early morning hours of the 10th day of

December, 1973, a Vermillion, South Dakota, police officer issued a parking ticket to an automobile pursuant to a Vermillion ordinance which prohibits parking in the downtown area from 2:00 A.M. to 6:00 A.M. At approximately 10:00 A.M. on the morning of December 10th, a meter maid for the City of Vermillion issued another ticket to the automobile for an expired parking meter violation. After completing her rounds, the meter maid returned to the station and informed police officer Robert Frank that the vehicle had been issued another ticket.

Officer Frank then went to the vehicle and inspected the tickets. He called the towing service which was on call to the department that month and had the car towed to the city impounding lot.

The impounding lot had been the scene of past incidents of theft from locked cars kept there. Officer Frank observed a watch and numerous other items inside the car on the dashboard and on the backseat.

The officer then inventoried these items pursuant to the standard police department procedure. Using a tool kept by the tow truck operator, the officer unlocked the car and filled out a standard inventory sheet. The inventory covered the exterior condition, the seats, floor, and dashboard of the car, and the console glove compartment, which was closed but not locked. A quantity of marijuana was found in the glove compartment.

At 5:00 P.M. that day, Donald Opperman, the registered owner of the vehicle, appeared at the Police Department and received from the police the items of personal property that were not seized.

A complaint charging M . Opperman with possession of less than one ounce of marijuana was issued on the 20th day of December, 1973. On that date, he was arrested and taken before a magistrate.

At a trial held on February 21, 1974, Mr. Opperman was convicted of the above offense.

VI. REASONS FOR GRANTING CERTIORARI

A. THE JUDGMENT BELOW IS IN CONFLICT WITH THE DECISIONS OF THIS COURT.

The decision of the South Dakota court in this case is in conflict with *Cady v. Dombrowski*, 413 U.S. 433 (1973), on the question of whether evidence discovered inadvertently by police during a lawful examination of the contents of a legally impounded automobile is admissible. The decision is in conflict with *Harris v. The United States*, 390 U.S. 234 (1968), and with *Cooper v. California*, 386 U.S. 58 (1967), on the question of whether the purposes of safeguarding an automobile owner's property and protecting the police allow a full inventory of an automobile that is lawfully in police custody. The decision conflicts with *Cooper, supra*, on the question of whether a lawful inventory of an automobile includes an inventory of the contents of an unlocked glove compartment.

In *Cady v. Dombrowski, supra*, the defendant's automobile was towed from an accident and searched because it was believed that a weapon was in the car. This Court upheld the search emphasizing that (1) the car was in policy custody because it had to be moved and stored or it would have constituted a nuisance, and (2) the motive for the search was not to find incriminating evidence but to follow a standard police procedure. 413 U.S., at 442, 443. Both of these factors were clearly present in the instant case.

First, as in Cady, the automobile here was not

> . . .simply momentarily unoccupied on a street. Rather, like an obviously abandoned vehicle, it represented a nuisance, and there is no suggestion in the record that the officers' action in exercising control over it by having it towed away was unwarranted either in terms of state law or sound police procedure.

413 U.S., at 447. Mr. Opperman did not contend, nor did the South Dakota courts find, that the impoundment was illegal.

Second, it is equally clear that the motive was not to find evidence but to follow standard police procedure. The investigating officer did not know the defendent, had not seen the automobile before, and had no reason to think the automobile might contain incriminating evidence.

A large number of items were inside the car, including personal papers, shotgun shells, tapes, speakers, spark plugs, a class ring, etc. The lot in which impounded automobiles were stored had been the scene of past instances in which property had been stolen from locked cars.

The officer inventoried the condition of the exterior of the automobile and the contents of the interior, as was done for all impounded automobiles, and filled out a standard police form.

Thus in both *Cady* and the present case, the police came into contact with the vehicle because of their non-criminal community caretaking duties in the area of traffic regulation, and in both cases the purpose of their examination of the vehicle was something other than a search for incriminating evidence. The purposes of the inventory in this case were to safeguard the owner's property and to protect the custodians of the vehicle. These purposes were recognized in *Harris v. United States*, 390 U.S. 234 (1968) and in *Cooper v. California*, 386 U.S. 58 (1967).

In both *Cooper* and the present case the incriminating evidence was found in the glove compartment of the vehicle during an inventory. However, the South Dakota court held that an inventory must be restricted to safeguarding articles which are within the plain view of the officer's vision.

In *Cady*, this court held that the analysis of *Harris* was controlling. 413 U.S., at 442. Under this analysis, if the officer's presence is for a justified purpose, evidence which comes within his plain view is admissible. *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971).

In the present case the officer's presence and opening of the glove compartment were justified under *Cady*, *Harris* and *Cooper*, and the evidence discovered should have been held admissible.

In addition to being in conflict with these decisions, the present case conflicts with other actions of this Court regarding inventories of automobiles. In several cases this Court has denied certiorari where the opinion below upheld an inventory search. *Gravitt v. United States*, 484 F. 2d 375 (5th Cir. 1973), cert. denied 414 U.S. 1135 (1974); *Thomas v. Washington*, unreported, summary at 41 L.W. 3478, cert. denied, 413 U.S. 921 (1973); *United States v. Pennington*, 441 F. 2d 249 (5th Cir. 1971), cert. denied 404 U.S. 854 (1971); *United States v. Robbins*, 424 F. 2d 57 (5th Cir. 1970), cert. denied 402 U.S. 985 (1971); *United States v. Lipscomb*, 435 F. 2d 795 (5th Cir. 1970), cert. denied 401 U.S. 980 (1971).

In two cases, lower court judgments holding an inventory illegal were vacated. *Carey v. Gammons*, 475 F. 2d 1392 (3rd Cir. 1973), judgment vacated, 414 U.S. 807 (1973); *Heffley v. Hocker*, 420 F. 2d 881 (9th Cir. 1969), judgment vacated, 399 U.S. 521 (1970).

In this case there is no question that the impoundment was legal. There is absolutely no basis for even the slightest suggestion that the motive for the inventory was anything other than compliance with standard police procedure. The scope of the inventory did not exceed that of the inventory in *Cooper*. Yet in spite of these facts and the governing decisions of this Court, the South Dakota court held that the inventory was an illegal search. Thus the decision is in clear conflict with the relevant decisions of this Court.

B. THERE IS A CONFLICT BETWEEN THE STATE COURTS CONCERNING THE QUESTION PRESENTED.

A large number of automobile inventory cases have been decided by state courts in recent years. A review of these cases

reveals a number of fundamental differences in judicial response to the inventory situation.

Courts have both upheld 1/ and struck down 2/ inventories in a substantial number of cases. While the reasonableness of a search always depends on the facts of the particular case, *Cooper, supra*, 386 U.S. at 59, a decision by this Court in the present case would reduce the conflicting results of the decisions of the state courts. It would reduce the inconsistent resolution of the questions of when an inventory may be conducted and what the scope of the inventory may be.

1/ *State v. Achter*, ___ Mo. ___, 512 S.W. 2d 894 (1974); *City of St. Paul v. Myles*, 218 N.W. 2d 697 (Minn. 1974); *People v. Sullivan*, 29 N.Y. 2d 69, 323 N.Y.S. 2d 945, 272 N.E. 2d 464 (1971), reversing, 35 A.D. 2d 690, 315 N.Y.S. 2d 274 (1970); *State v. Raiford*, 7 Or. App. 302, 490 P. 2d 1036 (1971); *Cabbler v. Commonwealth*, 212 Va. 520, 184 S.E. 2d 781 (1971); *Warrix v. State*, 50 Wis. 2d 368, 184 N.W. 2d 189 (1971); *State v. Wallen*, 185 Neb. 44, 173 N.W. 2d 372 (1970); *Godbee v. State*, 224 So. 2d 441 (Fla. App. 1969); *State v. Criscola*, 21 Utah 2d 272, 444 P. 2d 517 (1968); *State v. Montague*, 73 Wash. 2d 381, 438 P. 2d 571 (1968); *St. Clair v. State*, 11 Md. App. 605, 232 A. 2d 565 (1967); *Heffley v. State*, 83 Nev. 100, 423 P. 2d 666 (1967); *People v. Trusty*, ___ Col. ___, 516 P. 2d 123 (1973); *People v. Willis*, 46 Mich. App. 436, 208 N.W. 2d 204 (1973).

2/ *State v. Bradshaw*, 41 Ohio App. 2d 48, 322 N.E. 2d 311 (1974); *Dixon v. State*, 16 Crim. L.R. 2140 (Md. Spec. App. 1974); *State v. Gwinn*, ___ Del. ___, 301 A. 2d 291 (1973); *State v. Nemrod*, 85 N.M. 111, 509 P. 2d 885 (1973); *Boulet v. State*, 17 Ariz. App. 64, 496 P. 2d 504 (1972); *Mozzetti v. Superior Court of Sacramento County*, 4 Cal. 3d 699, 94 Cal. Rptr. 412, 484 P. 2d 84 (1971). See *Embree v. State*, 488 P. 2d 588 (Okl. Cr. 1971); *Mayfield v. United States*, 276 A. 2d 123 (D.C. App. 1971).

While the South Dakota court held that only items in plain view could be inventoried, other courts have held that where the owner cannot be located the inventory may include the trunk of an automobile. *People v. Trusty*, ___ Colo. ___, 516 P.

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2d 123 (1973). See also *State v Gowans,* 18 Ariz. App. 110, 500 P. 2d 641 (1972); *Fruit v. State,*____Ok. Cr. App.___, 16 Crim. L.R. 2197 (1974). South Dakota differs from Nebraska on the question of whether a glove compartment is a proper part of an inventory. *State v. Wallen,* 185 Nebr. 44, 173 N.W. 2d 372 (1970).

While some courts have held that baggage may be opened and inventoried, *State v. Wallen,* 185 Nebr. 44, 173 N.W. 2d 372 (1970); *United States v. Davis,* 496 F. 2d 1026 (5th Circuit 1974), others hold that baggage should not be opened. *State v. Nemrod,* 85 N.M. 111, 509 P. 2d 885 (1973); *State v. Gwinn,* ____Del.___, 301 A. 2d 29 (1973). In Arizona, the trunk may be opened but baggage within the trunk may not be. See *Boulet v. State,* 17 Ariz. App. 64, 496 P. 2d 504 (1972), and *State v. Gowans,* 18 Ariz. App. 110, 500 P. 2d 641 (1972).

An Ohio court has held that the driver of the vehicle should be asked whether he wishes to have the vehicle inventoried or merely stored. *State v. Bradshaw,* 41 Ohio App. 2d 48, 322 N.E. 2d 311 (1974). A New Mexico court has held that an auto rental agency's request for impoundment, where the driver's possession was unauthorized, was irrelevent to the question of the inventory. *State v. Nemrod,*____N.M.___, 509 P. 2d 885 (1973).

The South Dakota court found that an inventory constitutes a search, but a Michigan court has held otherwise. *People v. Willis,* 46 Mich. App. 436, 308 N.W. 2d 204 (1973).

While numerous courts have alluded to the motive of protecting the police from false claims, *State v. Wallen,* 185 Nebr. 44, 173 N.W. 2d 372 (1970), *Heffley v. State,* 83 Nev. 100, 423 P. 2d 666 (1967), the South Dakota court found that removing objects in plain view would insulate the police from liability under South Dakota law. See also *Mozetti v. Superior Court of Sacramento County,* 4 Cal. 3d 699 94 Cal. Rptr. 412, 484 P. 2d 84 (1971).

Although the incidence of inventory cases has mushroomed, no uniform approach to them has developed. The intervention

of this Court is essential in order to prevent the continuation and increase in disparity between state courts.

C. THERE IS A CONFLICT AMONG THE FEDERAL COURTS OF APPEAL ON THE QUESTION PRESENTED.

In addition to the disparity between the state courts, there are conflicts between the states and the federal circuits in which they are located and among the federal circuit courts themselves on the question presented.

Inventories have been upheld in three circuits. *United States v. Pennington,* 441 F. 2d 249 (5th Cir. 1971), cert. denied 404 U.S. 854 (1971); *United States v. Fuller,* 433 F. 2d 533 (D.C. Cir. 1970); *United States v. Sifuentes,* 504 F. 2d 845 (4th Cir. 1974). Four other circuits have held inventories invalid. *United States v. Lawson,* 487 F. 2d 468 (8th Cir. 1973); *Carey v. Gammons,* 475 F. 2d 1397 (3rd Cir. 1973), judgn ent vacated, 414 U.S. 897 (1973); *Cady v. Dombrowski,* 471 F 2d 280 (7th Cir. 1972), reversed, 413 U.S. 433 (1973); *Uni ed States v. Capra,* 501 F. 2d 267 (2nd Cir. 1974).

In addition to this split, there are two circuits which have come down on both sides of the question, the Ninth Circuit and the Tenth Circuit. *Heffley v. Hocker,* 420 F. 2d 881 (9th Cir. 1969), judgment vacated, 399 U.S. 521 (1970); *United States v. Mitchell,* 458 F. 2d 960 (9th Cir. 1972); *United States v. Roe,* 495 F. 2d 600 (10th Cir. 1974); *United States v. McDevitt,* 508 F. 2d 8 (10th Cir. 1974).

The number of reported decisions in both the state and federal courts involving inventories indicates that the issue is a recurring problem in the administration of criminal justice. The disparity in decisions could be reduced considerably by a decision of this Court in the present case.

VII. CONCLUSION

For the reasons stated, it is respectfully submitted that certiorari should be granted, and that the judgment of the Supreme Court of South Dakota be reversed.

Respectfully submitted,

WILLIAM J. JANKLOW
Attorney General of South Dakota

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APPENDIX A

Judgment of the South Dakota Supreme Court

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

STATE OF SOUTH DAKOTA,

Respondent,

vs.

DONALD OPPERMAN,

Petitioner.

* * * *

APPEAL FROM DISTRICT COUNTY COURT
SECOND JUDICIAL DISTRICT, CLAY
COUNTY, SOUTH DAKOTA

HON. DONALD ERICKSON, JUDGE

OPINION FILED April 15, 1975

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WINANS, Justice.

Defendant-appellant was convicted of possession of less than one ounce of marijuana in violation of SDCL (1967) 39-17-95. He contends, as he did in the court below, that it was error for the trial judge to allow the product of the search and all fruits flowing from it to be introduced into evidence because the search was in violation of the Fourth Amendment to the United States Constitution.

The facts surrounding this search are as follows: During the early morning hours of December 10, 1973, Vermillion police officer, William Herrick, issued a parking ticket to appellant's automobile pursuant to a Vermillion ordinance which prohibits parking in the downtown area from 2:00 A.M. to 6:00 A.M. At approximately 10:00 A.M. on the morning of December 10th a metermaid for the City of Vermillion issued another ticket to appellant's vehicle for an expired parking meter violation. She returned to the station and informed Police Officer Frank that the vehicle had been issued a second ticket.

Officer Frank went to the car and inspected the tickets. He then called for the assistance of a tow truck operator who towed the vehicle to the city impound lot. At this time the vehicle was locked and all windows were closed. The police officer ordered the tow truck operator to break into the vehicle, which he succeeded in doing by unlocking the door with a tool. Frank then seized a number of articles, among which was a watch on the dashboard. These articles were in plain view and are not in issue for the purposes of this appeal.

After securing all articles of value within the area of his vision, the officer continued his exploration of the vehicle by entering the closed console where he found and seized a plastic bag containing a leafy substance which was later determined to be marijuana.

Prior to this seizure Frank had no probable cause to believe that the automobile contained contraband, nor was appellant under arrest. His car was towed for violating a mere parking ordinance and was searched pursuant to a Vermillion Police Department procedure.

I.

As a threshold question we must decide if a detailed inventory of a private vehicle is a search which falls within the Fourth Amendment prohibition against unreasonable searches and seizures.

The Supreme Court of the United States has not decided whether an inventory procedure is a search. In Cady v. Dombrowski, 1973, 413 U.S. 433, 93 S. Ct. 2523,2528, 37 L. Ed. 2d 706,715 (Fn.), Justice Rehnquist, noting the state's argument that an inventory is not a search because it is not conducted to uncover evidence of a crime, said, "We need not decide this issue". This court, however, must. Logic and well-reasoned decisions from other jurisdictions lead us to conclude that an intrusion into a citizen's vehicle, as in the instant case, is a search.

The California Supreme Court, in a factual situation close to the instant case, decided that an inventory procedure conducted pursuant to a police regulation is a search cognizable under the Fourth Amendment. See Mozetti v. Superior Court of Sacramento County, 1971, 94 Cal. Rptr. 412, 484 P. 2d 84.

In that case defendant was removed to a hospital after sustaining injuries in a two-car collision. Her vehicle was blocking the roadway and arrangements were made to have it towed to a storage facility pursuant to a California statute. Prior

to towing, in accordance with standard police department procedure, an officer of the Sacramento Police Department prepared an inventory of the contents of defendant's automobile. He opened an unlocked suitcase in the rear seat of the vehicle, apparently to determine if it contained anything of value. A plastic bag containing marijuana was found. Defendant's motion to suppress the evidence was rejected by the trial court. But on appeal the Supreme Court held that error was committed when the evidence found in the closed suitcase was not suppressed.

The prosecution in *Mozetti*, as in the instant case, sought to validate the inventory of defendant's vehicle by distinguishing between an inventory and a search. The state contended that an inventory is conducted not to uncover evidence of criminal activity, but to prevent the theft of articles left in the car. Thus it was argued the procedure is not a Fourth Amendment search.

Rejecting this theory the Supreme Court of California said, and we concur, that:

> "It seems undeniable that a routine police inventory of the contents of an automobile involves a substantial invasion into the privacy of the vehicle owner. *Regardless of professed benevolent purposes and euphemistic explication, an inventory search involves a thorough exploration by the police into the private property of an individual.* In that process suitcases, briefcases, sealed packages, purses – anything left open or closed within the vehicle – is subjected without limitation to the prying of authorities. Merely because the police are not searching with the express purpose of finding evidence of crime, they are not exempt from the requirements of reasonableness set down in the Fourth Amendment. Constitutional rights may not be evaded through the route of finely honed but nonsubstantive distinctions." (emphasis supplied) 484 P. 2d at 88.

The Fourth Amendment's prohibition against unreasonable search and seizure serves as a protective border between necessary investigations by governmental agents and the constitutional grant of privacy to our citizens. Rejecting a restricted interpretation of this amendment the Supreme Court stated:

> "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara v. Municipal Court, 1967, 387 U.S. 523,528, 87 S. Ct. 1727, 1730, 18 L. Ed. 2d 930,935.

Contrary to this expression of the purpose of the Fourth Amendment by the United States Supreme Court, the State contends that if this Court approves inventory searches, we will not thereby give police an unbridled power to search for evidence without justification because a valid inventory does not have as its motive a desire to find evidence. We cannot accept this contention. As previously noted, the Fourth Amendment protects our citizens' right to privacy and it is mere semantics to say that a detailed search of one's car is not a substantial invasion of privacy, even if it is made for the professedly benevolent purpose of theft prevention. This Court does not subscribe to a limited and semantical reading of the concept of "search" as used in the Fourth Amendment. Rather, we believe that that Amendment:

> "* * * governs all intrusions by agents of the public upon personal security, and * *[makes] the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness. * * This seems preferable to an approach which attributes too much significance to an overly technical definition of

'search,' ". (citations omitted) Terry v. Ohio, 1968, 392 U.S. 1,18 Fn. 15, 88 S. Ct. 1868,1878, 2 L. Ed. 2d 889,904.

The Eighth Circuit Court of Appeals has also refused to attribute too much significance to an overly technical definition of "search". In United States v. Lawson, 1973, 8 Cir., 487 F. 2d 468,472, the Court said it would not be bound by a

> "* * * highly technical construction of the meaning of 'search,' unwarranted in our view of the Fourth Amendment. To consider an inventory procedure not to be a 'search' does violence to the concept of the Fourth Amendment as a protection of the privacy of the citizenry against unwarranted invasion by government officials."

In *Lawson* the Court upheld the lower court's holding granting defendant's motion to suppress evidence in the form of a revolver seized from the trunk of his impounded car by local police officers in Aberdeen, South Dakota. The Court held that because the only justification for the search of the automobile was its mere possession by the police, the gun found in the locked trunk was improperly seized and was inadmissible as evidence.

It should be noted that in *Lawson* the defendant was in police custody, on a charge of passing insufficient funds checks when his car was impounded and searched. The warrantless search there could conceivably have been justified as being incident to a lawful arrest. See Chimel v. California, 1969, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685. No such justification is present in the instant case where the only violation by defendant was that of a parking ordinance.

Were this Court to hold that an inventory is not a "search" within the meaning of the Fourth Amendment we would be placing government agents in a better position when they have

no reason to search, because then a general exploratory "inventory" will be upheld; but if required to secure a warrant, they would have to describe with particularity the place to be searched and the articles to be seized. In *Camara*, supra, the Supreme Court gave expression to the inconsistency which would result from removing inventory searches from the larger category of "searches" which fall within the purview of the Fourth Amendment.

> "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." 387 U.S. at 530, 87 S. Ct. at 1732, 18 L. Ed. 2d at 936.

Because a holding by us that inventories are not searches would lead to the encouragement of fishing expenditions and a whitling away of Fourth Amendment protection we decline to so hold. Mindful that "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears", Coolidge v. New Hampshire, 1971, 403 U.S. 443,462, 91 S. Ct. 2022,2035, 29 L. Ed. 2d 564,580, and adopting the principles expressed in *Terry*, *Camara*, *Mozetti* and *Lawson*, we hold that the inventory procedure used by the Vermillion police is a search involving a substantial invasion of privacy which must conform to the reasonableness requirement of the Fourth Amendment.

II

Because the police procedure in the present case in a search it must comply with the Fourth Amendment, which provides that:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches

and seizures, shall not be violated; and no warrants shall issue but upon probably cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Only *unreasonable* searches are condemned by this Amendment. This Court must, therefore, determine whether the instant search was unreasonable, and if so found, the evidence in question must be suppressed.

At the outset we observe that beside a few well drawn exceptions, searches of private property without consent are unreasonable when government agents are not acting pursuant to a valid search warrant. See, e.g., Stoner v. State of California, 1964, 376 U.S. 483, 84 S. Ct. 889, 11 L. Ed. 2d 856, and Katz v. United States, 1967, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576. As the Court explained in Johnson v. United States, 1948, 333 U.S. 10, 68 S. Ct. 367, 92 L. Ed. 436:

"The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveilance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

The automobile, however, occupies a somewhat different position than does immovable property in the constitutional scheme of things.

"[A]utomobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office, provided that there is probable cause to believe that the car contains articles that the officers are entitled

to seize." Chambers v. Maroney, 1970, 399 U.S. 42, 90A S. Ct. 1975,1979, 26 L. Ed. 2d 419,426.

This distinction arises from both the highly mobile character of the automobile and the fact that, "extensive, and often noncriminal contact with automobiles will bring local officers in 'plain view' of evidence, fruits, or instrumentalities of a crime, or contraband." Cady v. Dombrowski, 1973, 413 U.S. 433,442, 93 S. Ct. 2523,2528, 37 L. Ed. 2d 706,715. Despite this distinction it must, of course, still be shown that the search was reasonable. See Preston v. United States, 1964, 376 U.S. 364, 84 S. Ct. 881, 11 L. Ed. 2d 777, and State v. McCreary 1966, 82 S.D. 111, 142 N.W. 2d 240.

It is difficult to draw a single, consistent thread through decisions which have passed on the reasonableness of vehicle searches. Justice Rehnquist acknowledged this in his oft-quoted dictum that:

"[T]he decisions of this Court dealing with the constitutionality of warrantless searches, especially when those searches are of vehicles, suggest that this branch of the law is something less than a seamless web." *Cady*, supra, 413 U.S. at 439, 93 S. Ct. at 2527, 37 L. Ed. 2d at 714.

Both petitioner and respondent have directed us to a trilogy of United States Supreme Court decisions which offer guidance in deciding whether the search in the instant case was reasonable.

In Cooper v. California, 1967, 386 U.S. 58, 87 S. C. 788, 17 L. Ed. 2d 730, defendant was arrested for a narcotics violation and his vehicle was impounded pursuant to a California statute which authorized the seizure of any vehicle used to unlawfully transport narcotics. The Court stated that "whether a search and seizure is unreasonable within the meaning of the Fourth

Amendment depends upon the facts and circumstances of each case". 386 U.S. at 59, 87 S. Ct. at 790, 17 L. Ed. 2d at 732. Looking to the facts of that case the Court in a 5-4 decision held the warrantless search to be reasonable because there was an intimate nexus between the reason for the arrest and the impoundment and subsequent search of the automobile. As pointed out by the Court:

> "[T]he officers seized petitioner's car because they were required to do so by state law. They seized it because of the crime for which they arrested petitioner. They seized it to impound it and they had to keep it until forfeiture proceedings were concluded. Their subsequent search of the car – whether the State had 'legal title' to it or not – was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained." 386 U.S. at 61, 87 S. Ct. at 791, 17 L. Ed. 2d at 732.

Cooper is clearly inapposite to the instant case because the vehicle here was not impounded for a forfeiture action. Nor was the reason for its impoundment (a parking violation) in any way related to the petitioner's subsequent arrest.

In arguing for the reasonableness of the instant search, the State places great weight on *Cady v. Dombrowski*, supra, where the Supreme Court held that the warrantless search of an automobile, which the officers reasonably believed to contain a gun, but which disclosed several bloody articles, was not an unreasonable search. Reliance on *Cady* ignores the factual considerations present there, but absent in the instant case. First, the automobile in *Cady* constituted a nuisance on the highway because it was inoperative due to the accident. The driver was unable to have the car towed because he was intoxicated and later comatose. Second, the police conducted the search for the revolver to prevent its falling into the wrong hands. The accident victim was a Chicago policemen, who the

police of Kewaskum, Wisconsin, believed was required by regulation to be armed at all times. When the revolver was not found on his person they had good cause to suspect it was in the vehicle. Therefore, this search, motivated by "concern for the safety of the general public", was held to be constitutionally reasonable.

As stated, vast factual distinctions separate the case at bar from *Cady*. Here the automobile was not located where it was a public nuisance. It was instead parked in a designated parking space. The record offers no reasons why petitioner could not arrange for the safekeeping of his vehicle at the time or after it was towed from where it had been parked. And most importantly, there was no reason for the Vermillion police to believe that the car contained anything which posed a potential threat to the public safety.

The final, and perhaps for our purposes most relevant, Supreme Court ruling on inventory searches is Harris v. United States, 1968, 390 U.S. 234, 88 S. Ct. 992, 19 L. Ed. 2d 1067. In *Harris* the defendant's automobile had been seen leaving the site of a robbery. The car was traced and the defendant was arrested as he was entering his automobile. The police decided to impound the defendant's automobile. At this time the windows of the car were open and the door was unlocked. After the automobile had been towed to the impound area, and pursuant to a police regulation, an inventory of the articles in the vehicle was taken. The police officer placed a property tag on the steering wheel, rolled up the windows and locked all the doors. While the officer was rolling up the windows and locking the doors, he discovered a registration card, which lay face up on the metal stripping over which the door closed. The Court held that the registration card was not seized in violation of the Fourth Amendment because the registration card was in "plain view."

> "Once the door had lawfully been opened, the registration card, with the name of the robbery victim on it, was plainly visible. It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced into evidence." 390 U.S. at 236, 88 S. Ct. at 993, 19 L. Ed. 2d at 1069.

The holding in *Harris* is predicated on, and limited to, the "plain view" exception to the warrant requirement. The record of the instant case clearly reflects that the contraband seized was not the product of a plain view discovery.

Because the considerations which were pivotal in *Cooper, Harris* and *Cady* are lacking in the case at bar we must "depend upon an analysis of the 'reasonableness' of the search here in question." *Lawson,* supra, at 471.

Under a standard of reasonableness warrantless searches of vehicles are to be approved only in a few carefully defined instances, among which are: Where there exists both probable cause and mobility at the time of the search, Carroll v. United States, 1925, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543; when a search is conducted under a reasonable belief that the vehicle contains an object which might endanger the general public, *Cady v. Dombrowski,* supra; when a search is incident to a lawful arrest, *Chimel v. California,* supra; and when an automobile is lawfully held as evidence of a crime preparatory to the institution of forfeiture proceedings as in *Cooper v. California,* supra.

There are no circumstances present in the instant case to justify the warrantless search of the contents of the closed console. The search was not incident to a lawful arrest; not based on probable cause to believe the vehicle contained contraband; not justified by the nature of the police custody involved; nor were exigent circumstances present.

Addressing the content that police have a right to conduct inventory searches to protect themselves from groundless claims the Court in *United States v. Lawson,* supra, said:

> "For the police practice considered here to be found reasonable under the Fourth Amendment, absent a warrant or falling within a recognized exception to the warrant requirement, there must be a *minimal interference* with the individual's protected rights. A police duty to safeguard the owner's property does not automatically give the police the right to search." (emphasis supplied) 487 F. 2d at 475.

And to the same effect the United States Supreme Court has stated that:

> "[L]awful custody of an automobile does not of itself dispense with consitutional requirements of searches thereafter made of it, * * the reason for and the nature of the custody may constitutionally justify the search." Cooper v. California, supra, 386 U.S. at 61, 87 S. Ct. at 791, 17 L. Ed. 2d at 733.

Cognizant that mere custody of a vehicle is not sufficent to cause a divestiture of Fourth Amendment protections we hold that "minimal interference" with a citizen's constitutional rights means that police inventory searches must be restricted to safeguarding those articles which are within plain view of the officer's vision. This limitation upon the scope of an inventory search of a vehicle has found implicit approval by this Court in State v. Catlette, 1974, S.D., 221 N.W. 2d 25, where Justice Doyle speaking for the Court interpreted the case of *Lawson v. United States,* supra, as limiting a reasonable search to "removal of objects within plain sight". The opinion states that an

inventory search limited to removing objects in plain view, if done without an investigative notive, is a reasonable search*. We now explicitly approve this rule.

Applying this standard to the instant case would mean that the officer had a right to enter the vehicle to remove those objects in plain view, such as the watch on the dashboard, to a place of safety. He had no right to conduct an exploratory search of either the console, the trunk or a closed suitcase. Of course, while lawfully retrieving articles from inside the vehicle the officer need not blind himself to what is within his field of vision because as aready noted:

> "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." *Harris v. United States*, supra, 390 U.S. at 236, 88 S. Ct. at 993, 19 L. Ed. 2d at 1069.

When in possession of an impounded car the police are acting as gratuitous depositors. SDCL 43-39-11 provides that "[a] gratuitous depository must use at least least care for the

* "The court's discussion in United States v. Lawson, supra, implies to us that in that case reasonableness ended with the removal of objects within plain sight – objects which when spotted by a passing vandal would provide the temptation for exploration into the vehicle and damage to its contents. Just as the situation in Cady v. Dombrowski, supra, demanded the locating of the revolver to protect the public, the facts in Lawson did not justify a search of the trunk merely to protect the police from potential liability.

In the instant case, we find that the scope of the intrusion here, if done for noninvestigative reasons, was reasonably related to the permissible purpose of preventing police liability. The record reveals that the hatchet and tire iron could possibly have been seen from outside the care. There were in a position so that the police in trying to remove possible temptation from vandals would have found the hatchet and tire iron in 'plain view'. See Cady v. Dombrowski * * *, and Harris v. United States,". (citations omitted) 221 N.W. 2d 25 at 29.

preservation of the thing deposited." Certainly removal of those objects within plain view and closing of windows and locking of doors satisfies the minimal standard of "at least slight care", thus protecting the police from civil tort claims. This view is shared by the California Supreme Court which said "In no case is an inventory of items not within plain sight essential to safeguard the contents or to fulfill a 'slight' duty of care." *Mozetti*, supra, at 90.

Because the only justifying circumstance presented to this Court in support of the warrantless search of the closed console was naked custody of the vehicle we must conclude that the instant search was unreasonable.

The judgment appealed from is reversed.

DUNN, Chief Justice, and DOYLE and COLER, JJ., concur.

WOLLMAN, J., dissents.

WOLLMAN, Justice (dissenting).

Because the intrusion by the police into defendant's automobile, even if it is characterized as a search, was clearly reasonable under the rationale of Cady v. Dombrowski, 1973, 413 U.S. 433, 93 S. Ct. 2523,2528, 37 L. Ed. 2d 706, I would hold that the trial court did not err in denying defendant's motion to suppress the evidence.

Defendant's automobile was first ticketed at 3 a.m., when an officer observed it parked on a street a short distance from a sign that informed the public that parking was prohibited from 2 a.m. to 6 a.m. Apparently the vehicle remained in place until approximately 10 a.m. the same day, when another police officer issued a ticket for overtime parking. In accordance with standard police procedures, the vehicle was then towed to the impoundment lot, where, again according to established routine procedures, an officer made an inspection of the exterior condition of the automobile. The glove compartment was unlocked. There was no entry by the police into the locked trunk compartment.

The officer who conducted the inspection and inventory testified that all vehicles taken to the impoundment lot are inventoried against a standard inventory sheet. This is done because in past instances property has been stolen from locked cars in the impoundment lot. The officer testified that he had never seen defendant's vehicle before, that he did not know defendant, and that he had no reason to suspect that the automobile might contain drugs.

There is nothing in the record to indicate that the police acted illegally, unreasonably or improperly in towing defendant's automobile from where it was illegally parked to the impoundment lot. The officers apparently treated defendant's automobile as they would have treated any other automobile found in the same circumstances. The record reveals that the Vermillion police department tows away vehicles for violation of ordinances designating restricted parking zones. The fair inference from the testimony of the officers is that vehicles thus illegally parked in the downtown area of Vermillion are considered to present more of a problem to city officials than those that are parked merely in violation of parking meter restrictions. The following language from Cady v. Dombrowski, supra, is applicable here:

> "* * * The Thunderbird was not parked adjacent to the dwelling place of the owner as in Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), nor simply momentarily unoccupied on a street. Rather, like an obviously abandoned vehicle, it represented a nuisance, and there is no suggestion in the record that the officers' action in exercising control over it by having it towed away was unwarranted either in terms of state law or sound police procedure."

The case of United States v. Lawson, 8 Cir., 487 F. 2d 468, is distinguishable. In that case, defendant was present at the

time his vehicle was seized by the police. There was nothing in the record to indicate that it was necessary for the police to impound the vehicle. (The Government expressly disavowed any contention that the search was incidental to a lawful arrest. 487 F. 2d at 469). Entry was made into the locked trunk compartment of the vehicle.

I would not restrict the police to an inventory of only those items that are in plain view within the interior of an automobile. Whether an inspection of the interior of a locked glove compartment would be reasonable or unreasonable would depend upon the circumstances under which such entry was made. Cady v. Dombrowski, supra. What was said in United States v. Gravitt, 5 Cir., 484 F. 2d 375, is applicable here:

> "* * * But we are confident that here, as in other contexts, reviewing courts will be fully capable of assuring that the scope of the intrusions involved will be tailored to the specific public interests which lie at the root of the finding that the intrusions are reasonable." (Citations omitted) 484 F. 2d at 380.

It would affirm the judgment.

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APPENDIX B

Oral ruling of South Dakota Circuit Court
February 21, 1974

ERICKSON, J.

Yes, gentlemen, quoting from the United States v. Lawson, on page 477, I think the Court sets forth the test, "We think the proper approach to the area is the access reasonableness of the police conduct in light of all the circumstances in the case without giving in the effect of the presence or absence of the police regulation."

The testimony of this particular case which in the fact of the particular area was the impound lot where it was located at, and it is highly insecure, in light of the fact the previous steps of the property from the automobiles parked, there can be no question that the police impounded this car under lawful city ordinance in the City of Vermillion.

It is the opinion of the Court that the basic test is whether or not it was reasonable to search under the circumstances. I find under this case, under the circumstances set forth in the Preliminary Hearing, the search was reasonable, and your motion is denied, Mr. Ulrich.

Supreme Court, U. S.
FILED
DEC 20 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-76

State of South Dakota,

Petitioner,

—v.—

Donald R. Opperman,

Respondent.

On Writ of Centiorari to the Supreme Court of South Dakota

APPENDIX

Petition for Certiorari Filed July 14, 1975
Certiorari Granted November 3, 1975

Page

STATEMENT OF CONTENTS OF APPENDIX 1

CHRONOLOGICAL LIST OF DOCKET ENTRIES
IN PROCEEDING BELOW 2

REFERENCES TO PETITION FOR CERTIORARI 3

IN THE
SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF SOUTH DAKOTA

APPENDIX

The content of the Appendix as agreed on by parties consists of a chronological listing of the docket entries in the proceedings below and references to the location in the Petition for Certiorari of (1) the Decision of the South Dakota Supreme Court and (2) the Ruling of the South Dakota Circuit Court for the First Judicial Circuit.

CHRONOLOGICAL LIST OF DOCKET ENTRIES

Document	*Date*	*Page of Lower Court Record*
Complaint	December 20, 1973	1
Warrant of Arrest	December 20, 1973	2
Endorsement for Trial	January 8, 1974	3
Motion to Suppress	February 14, 1974	4
Information	N.A.	5
Preliminary Hearing Transcript	N.A.	28-50
Court Instructions to Jury	February 21, 1974	6-16
Verdict	February 21, 1974	17
Sentence	March 14, 1974	20-21
Notice of Appeal	March 14, 1974	19
Assignments of Error	March 22, 1974	22
Stipulation of Record	N.A.	26
Jury Trial Transcript	N.A.	51-134

REFERENCES TO PETITION FOR CERTIORARI

South Dakota Supreme Court Decision is located in the Petition for Certiorari beginning on page 11.

First Judicial Circuit Court's Ruling is located in the Petition for Certiorari beginning on page 28.

IN THE SUPREME COURT

OF

THE UNITED STATES

1974-75 TERM

No. 75-76

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

STATE OF SOUTH DAKOTA,
Petitioner,

-vs-

DONALD OPPERMAN,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

The Respondent, DONALD OPPERMAN, respectfully prays that this Court enter an order denying the Petition for Writ of Certiorari to review the judgment of the Supreme Court of South Dakota entered in the above-entitled case on April 15, 1975.

I. THE JUDGMENT BELOW IS IN COMPLETE AGREEMENT WITH THE DECISIONS OF THIS COURT.

This Court has stated that for purposes of the Fourth Amendment there is a Constitutional difference between houses and cars, Chambers v. Maroney, 399 U.S. 42, 52, 90 S.Ct. 1975, 1982, 26 L.Ed.2d 419 (1970) and that these distinctions stem from both the highly mobile character of the automobile and the fact that, the extensive, and often noncriminal contact with automobiles will bring local officials in 'plain view' of evidence, fruits, or instrumentalities of a crime, or contraband, Cady v. Dombrowski 413 U.S. 433, 442 93 S.Ct. 2523, 2528, 37 L.Ed.2d 706 (1973). However, irrespective of these distinctions this Court has consistently held that Fourth Amendment protections against unreasonable searches and seizures are afforded to automobiles.

The standard for testing the validity of a search of a motor vehicle is whether the search was unreasonable under all circumstances. Preston V. United States, 376 U.S. 364, 367, 84 S.Ct. 881 (1964). It is clear from reading the opinions of this Court that mere legal custody of an automobile by the police does not create some new possessory right to justify the search of the vehicle.

In Cooper v. California, 386 U.S. 58, 61, 87 S.Ct. 788, 17 L.Ed.2d 730, this Court pointed out that "'lawful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it.'" The Court indicated that "the reason for and nature of the custody may constitutionally justify the search," and it held that custody of an automobile held as evidence of crime and pending forfeiture was such custody. And in Chambers v. Maroney 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970) the Court validated a search of an automobile in lawful police custody only because there was probable cause to believe it contained weapons and stolen money.

The State argues that Cady v. Dombrowski, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973) supports the use of inventory procedures employed in this case. This argument completely ignores the Court's emphasis on the factual considerations present in Cady and absent here. First, the vehicle in Cady was disabled as the result of an accident and constituted a nuisance along the highway. The driver, being intoxicated and later comatose, could not have made arrangements to have the car towed and stored. Second, the police conducted the search for the revolver to protect the public from the possibility that it might fall into untrained or malicious hands. The motorist in Cady was a Chicago policeman. The police of Kewaskum, Wisconsin, believed he was required by regulation to carry his service revolver at all times. They therefore had reason to believe that the vehicle contained the revolver when it was not found on his person.

To argue that the holding announced in Cady is applicable to the instant case ignores the vast factual distinction between the two cases. In the instance case, the vehicle was not in a position where it could be considered a public nuisance. There is no indication that Mr. Opperman cound not have made arrangements for the safekeeping of the vehicle at the time or after it was towed from the Vermillion street. And most important, there was no reason for the Vermillion police to believe that the car contained anything that may threaten the safety of the public.

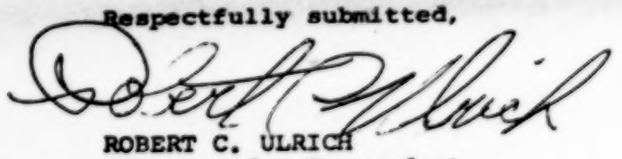
The Government further contends that the holding in this case conflicts with Harris v. United States, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968) and Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967). In Harris, evidence in plain view of a police officer, who was taking reasonable steps for the protection of the car, was held admissible. The reasonable steps taken for the protection of the impounded motor vehicle in that case dealt with the rolling of windows and locking of doors. This permissible police conduct certainly cannot be equated with breaking into a locked automobile and entering into the confines of the closed glove compartment even though both actions are said to be taken for the protection of the owner's property. Cooper also is a different case than what we have here. The automobile in Cooper was seized pursuant to statute specifying forfeiture of the car for its unlawful use. There was a close relationship between the reason for the arrest and the search, as well as the reason the vehicle was in custody. None of these considerations are applicable here.

In this case the Government cannot justify the intrusion into the Respondent's closed glove compartment within noted exceptions to the warrant requirement but rely solely upon the mere custody of the automobile and the existence of a police regulation. Such an argument does not seem adequate to justify the substantial invasion of Fourth Amendment protections involved here. The essential test of the validity of a search is reasonableness, yet the standard of reasonableness must be evolved in light of the Fourth Amendment, not in light of what the Government's view of reasonable police procedure might be. In addressing itself to a contention that it was reasonable to search an entire house without a warrant when a suspect is arrested in the house, the Supreme Court said in Chimel v. California, 395 U.S. 752, 764-765, 89 S.Ct. 2034, 2041, 23 L.Ed.2d 685 (1969);

> But the argument is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendments interests. Under such an unconfirmed analysis, Fourth Amendment protections in this area would reach the evaporation point.

The Repondent submits that the judgment of the Supreme Court of South Dakota is in complete agreement with the prior opinions of this Court and prays that an order be granted dismissing the Petition for Writ of Certiorari.

Respectfully submitted,



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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-76

State of South Dakota,

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—v.—

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Respondent.

BRIEF OF PETITIONER

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INDEX

Page

I. OPINION BELOW 1
II. GROUND ON WHICH JURISDICTION IN INVOKED 1
III. QUESTION PRESENTED 2
IV. CONSTITUTIONAL PROVISIONS INVOLVED 2
V. STATEMENT OF THE CASE 2
VI. ARGUMENT 3

CASES

Almeida-Sanchez v. United States, 413 U.S. 268 (1973) 10
Cady v. Dombrowski, 412 U.S. 433 (1973) 4, 5, 6, 7, 8, 9
Camara v. Municipal Court, 387 U.S. 523 (1967) 6
Cardwell v. Lewis, 417 U.S. 583, 590 (1974) 10
Chambers v. Maroney, 399 U.S. 42 (1970) 9
Cooper v. California, 386 U.S. 58 (1967) 5, 7
Harris v. United States, 390 U.S. 234 (1968) 4, 5, 7
Katz v. United States, 389 U.S. 347 (1967) 9
People v. Sullivan, 29 N.Y. 2d 69, 323 N.Y.S. 2d 945, 272 N.E. 2d 464 (1971) 4
Terry v. Ohio, 392 U.S. 1 (1968) 4, 5
United States v. Gravitt, 484 F. 2d 375 (5th Cir. 1973), cert. denied, 414 U.S. 1135 (1974) 7
United States v. Robinson, 414 U.S. 218 (1973) 10
Wyman v. James, 400 U.S. 309 (1971) 4, 5, 6

OTHER REFERENCES

20 Vill. L.F. 147, at 162 8

IN THE

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OCTOBER TERM, 1975

NO. 75-76

State of South Dakota,

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Respondent.

BRIEF OF PETITIONER

I. OPINION BELOW

The opinion of the Supreme Court of South Dakota is reported at 228 N.W. 2d 152 (1975).

II. GROUND ON WHICH JURSIDICTION IS INVOKED

The judgment of the South Dakota Supreme Court was

entered on April 15, 1975. The Petition for Writ of Certiorari was filed within ninety (90) days of that date. The jurisdiction of this court is invoked under 28 U.S.C. 1257(3).

III. QUESTION PRESENTED

Whether the South Dakota Supreme Court erred in holding inadmissible evidence found in the glove compartment of a vehicle during an inventory of the contents of the vehicle by police, which inventory followed the lawful impoundment of the vehicle for parking violations, on the ground that the inventory was an illegal search under the Fourth Amendment of the United States Constitution.

IV. CONSTITUTIONAL PROVISIONS INVOLVED

The federal constitutional provision involved is the Fourth Amendment of the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

V. STATEMENT OF THE CASE

During the early morning hours of the 10th day of December, 1973, a Vermillion, South Dakota, police officer issued a parking ticket to an automobile pursuant to a Vermillion ordinance which prohibits parking in the downtown area from 2:00 A.M. to 6:00 A.M. At approximately 10:00 A.M. on the morning of December 10th, a meter maid for the City of Vermillion issued another ticket to the automobile for an expired parking meter violation. After completing her rounds, the meter maid returned to the station and informed police officer Robert Frank that the vehicle had been issued another ticket. (R. 61, 66-67).

Officer Frank then went to the vehicle and inspected the tickets. He called the towing service which was on call to the department that month and had the car towed to the city impounding lot. (R. 72, 73, 76).

The impounding lot had been the scene of past incidents of theft from locked cars kept there. Officer Frank observed a watch and numerous other items inside the car on the dashboard and on the backseat. (R. 33, 74, 76).

The officer then inventoried these items pursuant to the standard police department procedure. Using a tool kept by the tow truck operator, the officer unlocked the car and filled out a standard inventory sheet. The inventory covered the exterior condition, the seats, floor, and dashboard of the car, and the console glove compartment, which was closed but not locked. A quantity of marijuana was found in the glove compartment. (R. 74-79).

At 5:00 P.M. that day, Donald Opperman, the registered owner of the vehicle, appeared at the Police Department and received from the police the items of personal property that were not seized. (R. 93, 94).

A complaint charging Mr. Opperman with possession of less than one ounce of marijuana was issued on the 20th day of December, 1973. On that date, he was arrested and taken before a magistrate.

At a trial held on February 21, 1974, Mr. Opperman was convicted of the above offense.

ARGUMENT

EVIDENCE FOUND IN THE GLOVE COMPARTMENT OF AN IMPOUNDED AUTOMOBILE DURING AN INVENTORY OF ITS CONTENTS IS ADMISSIBLE UNDER THE FOURTH AMENDMENT BECAUSE THE INVENTORY PROCEDURE IS CONSTITUTIONALLY REASONABLE.

When law enforcement officers lawfully seize and impound an automobile following a traffic accident or traffic violation, or other noncriminal circumstance, evidence observed by an officer while driving the automobile or securing it is admissible in a criminal prosecution. *Harris v. United States*, 390 U.S. 234 (1968).

This case presents the question of whether the same is true for evidence found in the glove compartment of an impounded automobile while an officer is securing the property inside the automobile.

It is the position of the State of South Dakota, the petitioner, that the practice of making a list of the property inside of an impounded automobile and removing it for safekeeping is a reasonable practice under the Fourth Amendment. This included securing the property in an unlocked area within the automobile, such as the glove compartment.

The inventory procedure followed in this case is reasonable because it is an intrusion of limited scope into an area where there is not a reasonable expectation of absolute privacy, and the intrusion is for a noninvestigative purpose.

An inventory is not a search for Fourth Amendment purposes because it is not conducted with the intent to discover evidence of a crime. *Cf. Wyman v. James*, 400 U.S. 309 (1971). See also *People V. Sullivan*, 29 N.Y. 2d 69, 323 N.Y.S. 2d 945, 272 N.E. 2d 464 (1971). Whether or not it is characterized as a search, it is an intrusion which is reasonable under the Fourth Amendment. *See Terry v. Ohio*, 392 U.S. 1 (1968); *Wyman v. James, supra.*

In *Cady v. Dombrowski*, 413 U.S. 433 (1973), a case which involved a warrantless search of an automobile in police custody thought to contain a weapon, this Court noted it was unnecessary to consider the question of whether or not the procedure was a search, because the case was governed by *Harris v. United States*, 390 U.S. 234 (1968), and other cases. *Cady*, 413 U.S., at 442. Here again, the question of whether to attach

the "search" label to the police conduct is largely semantic.

In *Harris* and in *Cady*, the incriminating evidence was found inadvertently by an officer while engaged in a police function that was a constitutionally reasonable intrusion. An inventory of an impounded automobile which includes the contents of an unlocked glove compartment is also constitutionally reasonable conduct.

The Fourth Amendment provides that government actions shall not unreasonably invade the privacy and security of a citizen. *Terry v. Ohio*, 392 U.S. 1 (1968). It further provides that when a coercive invasion of privacy, a search, must take place, it must be reasonable. *Wyman v. James*, 400 U.S. 309 (1971). When the invasion is a search for criminal evidence, there must be probable cause.

Thus, a government invasion into the privacy of persons, houses, papers, and effects is limited by the Fourth Amendment, but this amendment does not come into play when the "effects" are not placed before government eyes as a result of government conduct, but only come to the attention of the government through inadvertence or other circumstances. If the entire set of circumstances which bring one's "effects" to the attention of the government include some government action, that action must be reasonable. Thus in *Harris*, supra, the officer had to have been justified in being at the place from which the plain view observation was made. His conduct in arriving at that position must be reasonable, and must not jeopardize the privacy and security of a citizen.

In both *Harris* and *Cady*, the respective intrusions into the automobiles were reasonable. In *Cooper v. California*, 386 U.S. 58 (1967), which involved an inventory of the glove compartment of an automobile held for forfeiture, the intrusion was also reasonable. Petitioner submits that the intrusion in the present case was, similarly, a reasonable one.

The most important factor indicating that the conduct was reasonable is the purpose of the procedure. In this case, the inventory procedure was conducted for a noninvestigative

community care-taking purpose. As in *Cady*, noncriminal contact with automobiles brought local officials in plain view of the evidence. *Cady*, supra, 413 U.S. at 442.

While the fact that the purpose was noninvestigative and was not to find incriminating evidence may not automatically validate the procedure for Fourth Amendment purposes, it is a strong indication of reasonableness. It is unlikely that police action designed to serve a noncriminal, community caretaking function will be unreasonable.

If the police conduct, although not for purposes of criminal investigation, constitutes an arbitrary intrusion for no reason or a random harassment of citizens, it is unreasonable. But where the intrusion serves a legitimate noncriminal purpose, it may be presumed not to violate the Fourth Amendment. *Wyman, supra.*

In the present case there is no indication that the motive was anything other than to itemize and secure the property in the automobile against theft. The record indicated that the investigating officer did not know the Defendant, had not seen the automobile before, and had no reason to think the automobile might contain incriminating evidence. The South Dakota Supreme Court considered the question of motive as one which created an anomaly because an individual's automobile could be inventoried when there was no indication of criminal conduct, but if he was suspected of criminal conduct there would have to be probable cause for a warrant. Petition for Certiorari, page 17. This anomaly was discussed in *Camara v. Municipal Court*, 387 U.S. 523 (1967).

In fact, however, if the limited inventory to secure personal property is held constitutionally permissible, no such discrepancy will exist. If the police have such custody of an automobile as makes it reasonable for them to use an inventory procedure to secure the property inside it, they may do so whether or not the owner is suspected of criminal activity. If they go beyond those steps which are reasonable to secure the property, either because they are suspicious of the owner or for

any other reason, the additional intrusion will be deemed unreasonable. As one lower court has said in upholding an inventory,

> We are conscious, too, of the possibility that the police, in some circumstances warranting some limited form of inventory search, and they often conduct searches which range beyond what is required by any legitimate police need. (Citations omitted). But we are confident that here, as in other contexts, reviewing courts will be fully capable of assuring that the scope of the intrusions involved will be tailored to the specific public interests which lie at the root of the finding that the intrusions are reasonable.

United States v. Gravitt, 484 F. 2d 375 (5th Cir. 1973), cert. denied, 414 U.S. 1135 (1974). Thus there will be no discrepancy in treatment between those suspected of criminal behavior and others whose automobiles come into contact with the police. Where a noncriminal caretaking inventory is warranted, it may be conducted in either case, but its scope must be reasonable in light of its limited, noninvestigative purpose.

The noncriminal purposes of the procedure followed in this case have been recognized in prior decisions of this Court. These purposes are safeguarding the property of the owner, protecting the public, and insuring the safety and protection of the custodians of the automobile. *Harris*, supra; *Cooper*, supra; *Cady*, supra.

In addition to the element of noncriminal community caretaking purpose, other factors warrant the conclusion that the conduct was reasonable. The procedure followed was a standard police procedure, uniformly applied to all impounded vehicles. This is reasonable police conduct and also is a factor indicating the absence of any investigative motive. The officer conducting the inventory completed a standard police form. The inventory covered the exterior condition of the automobile, the seats, floor, and dashboard of the car, and the glove compartment. These are all plain view areas, with the

exception of the unlocked glove compartment. There is no indication in the record of any intrusion into the trunk, or into a locked suitcase, bound parcel, etc.

Thus the procedure in this case was of limited scope, reasonably suited to the purpose for the intrusion. This case does not present the question of whether opening a locked trunk or other locked areas is reasonable to secure the property. In general, it is submitted that the scope of an inventory to protect property is limited by the need to describe the property with sufficient detail to list it, and the need to secure the property sufficiently to guard against theft. Whether, for example, opening a locked suitcase instead of merely removing it is a reasonable step to secure the contents of the suitcase, is a question left for later cases. However, the contents of an unlocked glove compartment are as accessible to an intruder as are items in plain view. Securing the contents of an unlocked glove compartment is a reasonable step to be taken in order to safeguard the contents of the automobile.

In the present case, the procedure is further made reasonable by the conditions of the impoundment of the automobile. The vehicle was impounded by a small town police force which presumably could not have assigned officers to guard the vehicle around the clock. See *Cady, supra,* 413 U.S. at 447. The record shows that the impound lot had been the scene of prior thefts from vehicles. The possibility of theft warranted the removal of the property most easily stolen from the vehicle. The minimal intrusion used to secure this property was reasonable in light of the need to secure it.

It is sometimes asserted in regard to inventories that because the search is, in part, to protect the owner of the automobile, the procedure goes too far or is improper if it results in a detriment to the owner, such as the admission of evidence against him. 20 Vill. L.R. 147, at 162. This is an unusual approach to the function of law enforcement authorities. If a police officer checks the door of an establishment while on patrol, for example, and observes illegal activity inside, it is

irrelevant that the owner of the building, the person the officer was trying to protect, is the person observed. If a routine police function puts an officer in a position to observe illegality, it cannot matter that the observation incriminates the person intended to be protected by the police activity. The fact that an inventory may yield evidence against the owner although intended to protect the owner is not relevant to whether it is constitutionally reasonable.

If this criticism of inventories has any validity at all, it might preclude an inventory where the owner requests that no inventory be conducted. In this case, however, the owner was not available to be consulted. Because the police did not know when, if ever, the vehicle would be claimed, it was reasonable for them to follow their normal procedure and inventory the property inside it.

Finally, the inventory procedure is a reasonable one because of the area upon which the intrusion is made. An automobile is an "effect" for Fourth Amendment purposes. *Cady, supra,* 413 U.S., at 439. Thus, an individual does not lose the right of privacy provided by that amendment when he enters his automobile. However, the relevant question for purposes of the reasonableness of a search is what expectation of privacy one may legitimately have in the area searched. *Katz v. United States,* 389 U.S. 347 (1967).

For this purpose there is a constitutional difference between houses and automobiles. *Cady, supra,* 413 U.S., at 439; *Chambers v. Maroney,* 399 U.S. 42 (1970). The expectation of privacy in an automobile is reduced because police are likely to have considerable contact with automobiles "for reasons related to the operation of the vehicles themselves." *Cady,* at 441. This contact results from the extensive regulation of vehicles and traffic and the frequency with which a vehicle can become disabled or involved in an accident on public highways. *Cady,* at 441. Extensive and often noncriminal contact with automobiles may bring local officials in plain view of evidence. *Cady,* at 442. For instance, a search may be conducted incident to an arrest

for a traffic violation, which search could extend to areas within the vehicle. *United States v. Robinson*, 414 U.S. 218 (1973). While persons may legitimately expect privacy in their vehicles to a limited extent, it is unreasonable to expect immunity from police contact, even for closed areas within the vehicle. These areas might need to be examined after an accident, might be searched incident to an arrest, etc.

As this Court has stated, "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny." *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974). "The search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building." *Almeida-Sanchez v. United States*, 413 U.S. 268 (1973). (Powell, J., concurring). While the expectation of privacy may be greater in a glove compartment than in other areas inside a vehicle, the glove compartment is known as an area where valuable items are frequently kept, and it was therefore reasonable for the inventory to include that area.

In summary, the inventory conducted in this case was reasonable because it was for a valid noncriminal purpose involving normal noninvestigative police functions. It was conducted primarily to guard against theft of personal property in the vehicle, and its scope was limited to items in plain view and in the unlocked glove compartment inside the automobile, the contents of which are frequently valuable and which are as accessible to an intruder as other areas in plain view within the vehicle. The need to secure the property was increased by the fact that there had been prior thefts from vehicles at the impound lot. Further, the police department was small and could not post a guard at the lot. The owner could not be consulted in regard to the property inside the vehicle.

The intrusion was not upon the person or residence of the Respondent, but into his automobile, in which there is a lesser expectation of privacy.

The inventory is not rendered an unjustice to the owner because of the fact that it is intended to protect him. Nor does it result in any unequal or inconsistent treatment between those who are suspected of criminal behavior and those who are not.

Opening the glove compartment of Respondent's vehicle was reasonable government conduct that brought the officer into a position from which he observed evidence of a crime. The evidence is not the produce of an illegal search and therefore may be admitted into evidence in a criminal prosecution.

For these reasons, the Petitioner, the State of South Dakota, respectfully requests that this Court reverse the decision of the court below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-76

STATE OF SOUTH DAKOTA

Petitioner,

v.

DONALD OPPERMAN,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
STATEMENT OF CASE	1
ARGUMENT	4
I. A DETAILED "INVENTORY" OF A PRIVATELY OWNED AUTOMOBILE BY POLICE OFFICIALS CONSTITUTES A "SEARCH" WITHIN THE MEANING AND SCOPE OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION	4
II. A WARRANTLESS BLANKET SEARCH CONDUCTED BY POLICE OFFICIALS INTO THE CLOSED CONFINES OF A PRIVATELY OWNED AUTOMOBILE WHICH HAS BEEN TAKEN INTO THEIR BARE CUSTODY FOR A MERE PARKING VIOLATION DOES VIOLENCE TO THE FOURTH AMENDMENT STANDARD AGAINST "UNREASONABLE SEARCHES AND SEIZURES," AS A PROTECTION OF THE CITIZENRY AGAINST UNWARRANTED INVASIONS BY GOVERNMENTAL OFFICIALS	8
III. CONCLUSION	17

TABLE OF AUTHORITIES

Cases:

Brinegar v. United States, 338 U.S. 160 (1949)	10
Cady v. Dombrowski, 413 U.S. 433 (1973)	4,9,12,14
Carroll v. United States, 267 U.S. 132 (1925)	9,10,12,14
Camara v. Municipal Court, 387 U.S. 523 (1967)	6,7
Chambers v. Maroney, 399 U.S. 42, (1970)	9,11
Chimel v. California, 395 U.S. 752 (1971)	11,14

	Page
Coolidge v. New Hampshire, 403 U.S. 443 (1971)	12,14
Cooper v. California, 385 U.S. 443 (1971)	11,12,14,15
Dyke v. Taylor Implement Manufacturing Co., 391 U.S. 216 (1968)	11,12
Harris v. United States, 390 U.S. 234 (1968)	4,13
Husty v. United States, 282 U.S. 694 (1931)	10
Katz v. United States, 389 U.S. 347 (1967)	9
Mapp v. Ohio, 367 U.S. 643 (1961)	8
Mozzetti v. Superior Court of Sacramento County, 4 Ca. 3d 699, 94 Ca. Rptr. 412, 484 P.2d 84 (1971)	4,5,6,7,16
Preston v. United States, 376 U.S. 364 (1964)	10
Scher v. United States, 305 U.S. 251 (1938)	10
Terry v. Ohio, 392 U.S. 1, (1968)	5,7
Trupiano v. United States, 334 U.S. 699 (1938)	8
United States v. Lawson, 487 F.2d 468 (8th Cir. 1973)	6,7,15,16

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STATE OF SOUTH DAKOTA

Petitioner,

v.

DONALD OPPERMAN,

Respondent.

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Donald Opperman, hereinafter referred to as the respondent was a student attending the University of South Dakota at Vermillion (R. 111). During the early morning hours of the 10th day of December, 1973, his automobile was parked in a Vermillion business district. After several attempts to start the car at this time, the respondent left it parked in a regular metered stall on the main street of Vermillion and returned to his dormitory at USD. (R. 116,128). At this time the windows of the vehicle were closed and the doors and trunk were locked (R. 73,76).

During the early morning hours of the 10th day of December, 1973, Vermillion police officer William Herrick issued a parking ticket to the respondent's automobile pursuant to a Vermillion Ordinance which prohibits parking in the downtown area from 2:00 A.M. to 6:00 A.M. (R. 61).

At approximately 10:00 A.M. on the morning of the 10th of December, 1973, Mrs. Violet Delaney, a metermaid for the City of Vermillion, issued another parking ticket to the respondent's vehicle for an expired parking meter violation (R. 66). After issuing this second ticket, Mrs. Delaney returned to the Vermillion Police Department and informed Vermillion police officer Robert Frank that the respondent's vehicle had been issued this additional parking ticket (R. 67).

Officer Frank then went to where the respondent's vehicle was located and inspected the two tickets (R. 72). After examining these he called for the assistance of a tow truck operator (R. 72). Prior to this time, Officer Frank had not made any attempt to ascertain, locate, or notify the registered owner of the vehicle that it was to be towed (R. 99). However, the record is uncontested that the vehicle bore current South Dakota license plates (R. 62). The vehicle was then towed to the City impound lot (R. 73). At this time, the vehicle was locked and all windows were rolled up (R. 73,76). Officer Frank ordered the tow truck operator to break into respondent's automobile (R. 73). The tow truck operator succeeded in unlocking the doors to the car with a "tool" (R. 76). Frank then seized a number of articles from within the interior, among which were a watch that was located on the dashboard, a can of oil, sparkplugs and a pair of pliers (R. 77). These articles were all in plain view of Officer Frank and are not in

issue for the purposes of the instant case (R. 76). Although Officer Frank had secured all articles of value within his area of plain vision, he proceeded to further his search of the vehicle by entering into the closed console (R. 77-78).

Upon breaking into the closed console of the respondent's automobile, Officer Frank examined and removed various items of the respondent's personal property, including his personal checking account records, blank checks, class ring, and other items (R. 77-78). Also seized from the vehicle's console was a clear plastic bag containing marijuana in a quantity of less than one ounce and other smoking paraphenalia (R. 78-79). Prior to this seizure, Officer Frank did not suspect nor was he in possession of any information by which to form a suspicion that the vehicle contained marijuana (R. 78). The respondent was not under arrest at the time this search was conducted (R. 78). The officer had no probable cause to believe that marijuana was present in the automobile (R. 78). And no attempt, whatsoever, had been made to determine who the registered owner of this vehicle was prior to or at the time that the Vermillion Police Department broke into this car. The ease in which the owner could have been identified and notified is shown by the testimony of Officer Frank in the transcript of the trial (R. 98,99).

ARGUMENT

I.

A DETAILED "INVENTORY" OF A PRIVATELY OWNED AUTOMOBILE BY POLICE OFFICIALS CONSTITUTES A "SEARCH" WITHIN THE MEANING AND SCOPE OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This Court has not specifically decided whether an inventory procedure is a search. In *Cady v. Dombrowski*, 413 U.S. 433 (1973), a footnote to the majority opinion noted the question and stated it would not decide the issue because respondent had conceded the intrusion constituted a search. *Harris v. United States*, 390 U.S. (1968), indicates that an inventory would be regarded as a search;

> "The admissibility of evidence found as a result of a *search* under police regulation is not presented by this case." 390 U.S. at 236, 88 S.Ct. at 903 (emphasis supplied).

This question was answered affirmatively by the California Supreme Court in the case of *Mozzetti v. Superior Court of Sacramento County*, 4 Cal. 3d 699, 94 Cal. Rptr. 412, 484 P. 2d 84 (1971). The opinion in *Mozzetti* is compelling and well-reasoned. In that case the petitioner was involved in a two-car collision. She sustained injuries in the accident and was promptly removed to the hospital by an ambulance. When the police arrived at the scene, they determined that petitioner's vehicle was blocking the roadway and made arrangements to have the vehicle towed to police storage pursuant to California statutory authority.

In accordance with standard procedure, an officer of the Sacramento Police Department was instructed to prepare an inventory of the contents of petitioner's automobile before it was towed to police storage facilities. In the course of the inventory the officer saw a small suitcase in the back seat of the car. Finding the suitcase unlocked, he opened it, apparently to determine if it contained any articles of value. Inside he found a plastic bag containing a quantity of marijuana. Because petitioner's automobile was a convertible, at the conclusion of the inventory several items found in the car's interior, including the suitcase, were locked in the trunk. The car was then towed to a police storage garage and the keys were later turned over to the petitioner. The marijuana was seized and formed the basis of a criminal prosecution. Petitioner's motion to suppress was denied by the trial court. The California Supreme Court reversed.

The prosecution in *Mozzetti* sought to validate the inventory practice by distinguishing between an inventory and a search. The argument was that the purpose of a search is to seek contraband or evidence of guilt which has been concealed in order that it may be used in the prosecution of a criminal action, while the purpose of an inventory is entirely different. In rejecting such a distinction, the Court, in *Mozzetti*, observed that such a concept was expressly rejected by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. (1968).

> In our view, the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness. *** This

seems preferable to an approach which attributes too much significance to an overly technical definition of "search" *** 392 U.S. at 18 U.S. 15.

See also, *Camara v. Municipal Court*, 397 U.S. 523 (1967):

"It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." 387 U.S. at 530.

In finally disposing of the question of whether an "inventory" is a "search" within the meaning of the Fourth Amendment, *Mozzetti* states:

It seems undeniable that a routine police inventory of the contents of an automobile involves a substantial invasion into the privacy of the vehicle owner. Regardless of profession, benevolent purposes and euphemistic explication, an inventory search involves a thorough exploration by the police into the private suitcases, briefcases, sealed packages, purses – anything left open or closed within the vehicle – is subjected without limitation to the prying eyes of authorities. Merely because the police are not searching with the express purpose of finding evidence of crime, they are not exempt from the requirements of a reasonableness set down in the Fourth Amendment. Constitutional rights may not be evaded through the route of finely honed but nonsubstantive distinctions. 484 P.2d at 88, 94 Cal. Rptr. at 416.

The Eighth Circuit Court of Appeals also had an opportunity to decide this issue in *United States v. Lawson*, 487 F.2d 468 (8th Cir. 1973) and stated that: "... to consider an inventory procedure not to be a "search" does violence to the concept of the Fourth Amendment as a protection of the privacy of the

citizenry against unwarranted invasions by government officials." 497 F.2d at 472.

The Eighth Circuit Court of Appeals, in *Lawson*, upheld the lower court's holding which granted the defendant's motion to suppress evidence in the form of a revolver that was seized from the trunk of the defendant's impounded motor vehicle by the local police officers in Aberdeen, South Dakota. That Court held that where the only justification for the search of an automobile was its mere possession by the police, the gun that was found in the locked trunk was improperly seized and was not admissible in evidence.

To consider an inventory not a "search" within the meaning of the Fourth Amendment, this Court would be placing government officials in a better position when they have no reason to search. Under such a rule, a warrantless exploratory "inventory" will be allowed; but if a warrant were required, it would have to describe with particularity the things to be seized. Such an anomalous position would only lead to the encouragement of general fishing expeditions at the expense of the Fourth Amendment concepts. The respondent strenuously urges this Court to adopt the principles expressed in *Mozzetti*, *Lawson*, *Terry* and *Camara*, and hold that an inventory constitutes a "search" under the Fourth Amendment.

II.

A WARRANTLESS BLANKET SEARCH CONDUCTED BY POLICE OFFICIALS INTO THE CLOSED CONFINES OF A PRIVATELY OWNED AUTOMOBILE WHICH HAS BEEN TAKEN INTO THEIR BARE CUSTODY FOR A MERE PARKING VIOLATION DOES VIOLENCE TO THE FOURTH AMENDMENT STANDARD AGAINST "UNREASONABLE SEARCHES AND SEIZURES," AS A PROTECTION OF THE CITIZENRY AGAINST UNWARRANTED INVASIONS BY GOVERNMENTAL OFFICIALS.

The Fourth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643 (1961), provides that:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation and particularly describing the place to be searched and the person or things to be seized.

The historical basis for the warrant requirement expressed in this amendment has been noted by this Court:

> The people of the United States insisted on writing the Fourth Amendment into the Constitution because sad experience had taught them that the right to search and seize should not be left to the mere discretion of the police, but should as a matter of principle be subjected to the requirement of previous judicial sanction wherever possible. *Trupiano v. United States* 334, U.S. 699, 709-10 (1948).

From the language of the Fourth Amendment and its historical foundations, the general principle has been formulated that a lawful search requires a warrant to be issued. However, recognizing the existence of various factual situations that may either vitiate the need for a warrant or make it impractical for governmental officials to obtain one, this Court has carved out certain limited exceptions to the warrant requirement. Among these exceptions are consent searches, searches incident to a valid arrest, emergency searches, searches involving exigent circumstances to prevent the destruction of evidence or to seize evidence that is dangerous to police officers or other persons, and searches conducted while in hot pursuit. Except for these few well-delineated exceptions, warrantless searches have been considered "per se unreasonable," *Katz v. United States*, 389 U.S. 347, 357, 885. Ct. 507, 19 L.Ed.2d 576 (1967). The automobile has, however, been treated somewhat differently than other types of property: "for purposes of the Fourth Amendment there is a Constitutional difference between houses and cars," *Chambers v. Maroney*, 399 U.S. 42, 52, (1970). These distinctions stem from both the highly mobile character of the automobile and the fact that, "the extensive, and often noncriminal contact with automibiles will bring local officials in 'plain view' of evidence, fruits, or instrumentalities of a crime, or contraband." *Cady v. Dombrowski*, 413 U.S. 433, 442, (1973).

The prior cases heard by this Court involving searches of automobiles have almost exclusively dealt with the presence of probable cause. In *Carroll, v. United States*, 267 U.S. 132, (1925) this Court, while interpreting federal statutory provisions contained in the Volstead Act, enunciated the "mobility concept" of the

automobile as permitting or creating an exception to the warrant requirement when coupled with the presence of probable cause. In that case, this Court upheld the warrantless search of the vehicle where government agents had seized contraband concealed behind the back seat. The vehicle had been stopped on the highway at the time the search occurred and this emphasized the fact that the agents had probable cause to believe the vehicle contained contraband.

Following *Carroll*, this Court upheld various other automobile searches in the absence of a valid search warrant, *Husty v. United States*, 282 U.S. 694, (1931), *Scher v. United States*, 305 U.S. 251 (1938) and *Brinegar v. United States*, 338 U.S. 160 (1949). All of these cases were decided upon the fact that the government officials had probable cause to search and the vehicle was easily moveable at the time the search occurred.

In 1964, this Court, in *Preston v. United States*, 376 U.S. 364, (1964) held unconstitutional a warrantless search of an automobile after the defendant had been arrested for vagrancy and the defendant's automobile towed to the police garage and searched. The Court distinguished *Preston* from the *Carroll* type search on the grounds that no statutory authority existed under which to conduct the search in *Preston*, there was no danger existing that the automobile was easily moveable in *Preston*, and that the police were not possessed with probable cause to believe the vehicle contained contraband in *Preston* at the time the search was conducted.

In *Preston* this Court reiterated the Fourth Amendment distinctions between searches of automobiles and searches of fixed structures but emphasized the fact

that any search of an automobile must still be reasonable to satisfy Fourth Amendment standards.

> Common sense dictates, of course, that questions involving searches of motorcars or other things readily moved cannot be treated as identical to questions arising out of searches of fixed structures like houses. For this reason, what may be an unreasonable search of a house may be reasonable in the case of a motorcar. But even in the case of motorcars, the test is was [sic] the search reasonable. 376 U.S. at 366-367.

The Supreme Court in a 5-4 decision in *Cooper v. California*, 386, U.S. 58 (1967), held a warrantless search conducted after a lawful arrest met Fourth Amendment standards. A careful reading of *Cooper* reveals that the Court relied on the closeness of the relationship between the reason the vehicle was taken into police custody (i.e., for forfeiture proceedings) and the reason for Cooper's arrest (a narcotics violation). In that case this Court pointed out:

> . . . . the officers seized petitioner's car . . . because of the crime for which they arrested him . . . . Their subsequent search of the car was closely related to the reason his car had been impounded, and the reason it was being retained. 386 U.S. at 61.

Cooper is easily distinguishable from the instant case in that the reason the petitioner's vehicle was impounded (i.e., parking violation) was in no way related to the petitioner's subsequent arrest nor was the vehicle impounded for forfeiture action.

In more recent cases decided by this Court, *Chimel v. California* 395 U.S. 752 (1969), *Dyke v. Taylor Implement Manufacturing Co.*, 391 U.S. 216, (1968); and *Chambers v. Maroney* 399 U.S. 42 (1970), the

Court returned to the standards set forth in *Carroll;* the mobility of the vehicle and the existence of probable cause at the time the search occurred.

In *Coolidge v. New Hampshire,* 403 U.S. 443, (1971) this Court, relying upon *Dyke v. Taylor Implement Co., supra,* held that a warrantless search of the defendant's automobile which had been taken into police custody could not be justified in light of the Fourth Amendment standards. The Court once again relied upon a factual situation that lacked both probable cause and exigent circumstances.

In *Cady v. Dombrowski,* 413 U.S. 433 (1973), this Court held that the warrantless search of an automobile, which the officers reasonably believed to contain a gun, was not an unreasonable search. In *Cady* the Court emphasized the factual considerations. First, the vehicle in *Cady* was disabled as the result of an accident and constituted a nuisance along the highway. The driver, being intoxicated and later comatose, could not have made arrangements to have the car towed and stored. Second, the police conducted the search for the revolver to protect the public from the possibility that it might fall into untrained or malicious hands. The motorist in *Cady* was a Chicago policeman. The police of Kewaskum, Wisconsin, believed he was required by regulation to carry his service revolver at all times. They, therefore, had reason to believe that the vehicle contained the revolver when it was not found on his person.

To agrue that the holding announced in *Cady* is applicable to the instant case ignores the critical factual distinction between the two cases. In the instant case, the vehicle was not in a position where it could be considered a public nuisance. There is no indication

that Mr. Opperman could not have made arrangements for the safekeeping of the vehicle at the time or after it was towed from the Vermillion street. And most important, there is no reason for the Vermillion police to believe that the car contained anything that may threaten the safety of the public.

The primary case involving an inventory search that has been heard by this Court was *Harris v. United States* 390 U.S. 234 (1968). In *Harris* the defendant's automobile had been seen leaving the site of a robbery. The car was traced and the defendant was arrested as he was entering his automobile. At this moment, the windows of the car were open and a door locked. After the automobile had been towed to the impound area, and, pursuant to a police regulation, an inventory of the articles contained in the vehicle was taken. The police officer placed a property tag on the steering wheel, rolled up the windows and locked all the doors. While the police officer was rolling up the windows and locking the doors, he discovered a registration card, which lay face up on the metal stripping over which the door closed. This Court held that the registration card was not seized in violation of the Fourth Amendment because the registration card was in "plain view." This Court said,

> Once the door had lawfully been opened, the registration card, with the name of the robbery victim on it, was plainly visible. It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced into evidence. *Harris v. United States, supra* at 236.

The respondent does not take issue with the holding expressed in *Harris* but wishes to emphasize that

decision is based upon the "plain view" exception to the warrant requirement. In the instant case, not only does the record clearly reflect that the contraband seized from the automobile was not seized as the result of a plain view discovery, but also the state, in its brief, concedes that the intrusion had gone beyond the area of plain view. Brief of Petitioner, at 7-8.

It becomes apparent after examining the holding is the above-cited case that the Fourth Amendment standard of reasonableness must be applied to automobile searches. This standard of "reasonableness" has been restricted to uphold warrantless searches in only a few limited circumstances. The *Carroll* type search which requires the existence of probable cause and mobility at the time of the search. A search based upon a reasonable belief that the vehicle contained a weapon that may be harmful to the safety of the police, *Cady v. Dombrowski* (supra); searches incident to a lawful arrest; *Chimel v. California* (supra); and automobiles lawfully held by the police as evidence of crime preparatory to instituting forfeiture proceedings may be searched by police without a warrant, as in *Cooper v. California* (supra).

It becomes apparent after examining the holdings of the above cited cases that, "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears," *Coolidge v. New Hampshire* (supra) at 462. It also becomes apparent that the Fourth Amendment standard of reasonableness must be applied to automobile searches. In applying this appropriate test of reasonableness, it is the respondent's contention that this Court must balance the interests of the police with those of the drivers whose automobiles are searched.

It is not necessary for this Court to determine all of the reasons for, and natures of, police custody that might justify a search; here the only justification for the search is bare police custody of the vehicle. Obviously the police have an interest in safeguarding themselves against groundless claims. Just as obviously, and more importantly in terms of the Fourth Amendment, owners and operators of motor vehicles have an interest in safeguarding their possessions from unreasonable police intrusions. A rule that upon a showing of a legitimate governmental interest, the constitutional protections of citizens must give way, would eliminate those protections in the very situations for which they were intended. *United States v. Lawson*, 187 F.2d 468, at 475 (8th Cir. 1973).

For the police practice considered in this case to be found reasonable under the Fourth Amendment, absent a warrant or falling within a recognized exception to the warrant requirement, there must be minimal interference with the individual's protected rights. It can only be reasoned that a police duty to safeguard the owner's property does not automatically give the police the right to search.

> Lawful custody of an automobile does not itself dispense with the constitutional requirements of searches thereafter made of it, ... the reason for and the nature of the custody may constitutionally justify the search. *Cooper, supra*, 61.

The respondent would urge this Court to adopt the position taken by the California Supreme Court in addressing the contention that the inventory procedures are necessary and reasonable:

> This contention is rebutted by recognition of the vehicle owner's countervailing interest in maintain-

ing the privacy of his personal effects and preventing anyone, including the police, from searching suitcases, and other closed containers and areas in his automobile at the time the police lawfully remove it to storage. In weighing the necessity of the inventory search as protection of the owner's property against the owner's rights under the Fourth Amendment, we observe that items of value left in an automobile to be stored by the police may be adequately protected merely by rolling up the windows, locking the vehicle doors and returning the keys to the owner. The owner himself, if required to leave his car temporarily, could do no more to protect his property. *Mozzetti v. Superior Court*, 94 Cal. Rptr. at 417, 484 P.2d at 89; accord *United States v. Lawson*, *supra*, at 476.

The State has also argued upon the record of the trial court, and in their brief submitted to this Court, that such a search as occurred in the instant case can be justified merely because a departmental regulation existed which provided that all impounded vehicles are to be inventoried. To allow such an argument to pass Constitutional muster would do violence to Fourth Amendment standards. It is conceivable that many vehicles could be searched without a warrant and without probable cause if the police maintained a highly insecure impound area, employed diligent meter-maids and sought the services of only cooperative and capable tow truck operators. To uphold this search would be to endorse such activities. The following language from *Lawson* is helpful:

> It is not as obvious to us, as it appears to be to some courts, why the inventory procedure offers the police any more protection against false claims than would a standard policy of locking the car

> and returning the keys to the owner; or allowing the owner to make arrangements himself for the removal and storage of his vehicle. 487 F.2d at 476 (8th Cir. 1973).

In the instant case there were no circumstances to justify the search of the contents of the closed console without a warrant. The search was not incident to a lawful arrest, based on probable cause to believe the vehicle contained contraband, or justified by the peculiar nature of the police custody involved. Nor were there exigent circumstances which made the search reasonable and necessary. The respondent would urge this Court to hold that under the factual situation present in the instant case, the intrusion into the closed console of his locked automobile does not meet Fourth Amendment standards of reasonableness.

III.

CONCLUSION

An inventory of an automobile constitutes a search within the scope and meaning of the Fourth Amendment. To consider such a procedure not to be a "search" would do violence to the concept of the Fourth Amendment as a protection of the privacy of the citizenry against unwarranted invasions by government officials. Regardless of any professed benevolent purposes and euphemistic explications, an inventory search involves a thorough exploration by the police into the private property of an individual. Merely because the police are not searching with the express purpose of finding evidence of crime, they are not exempt from the requirements of reasonableness set down in the Fourth Amendment.

The State's position that an inventory search conducted according to a police policy is necessary to protect and safeguard both the property interests of the owner and the interests of the police against unfounded claims is based upon fallacious reasoning. The police, in this case, are held to a standard of slight care in safeguarding the respondent's automobile and its contents. All that would have been required of them to satisfy this duty would have been to roll the windows and lock the doors of the vehicle. Any further intrusion into the closed confines of the automobile can not be justified when measured against all the circumstances, without giving effect to the presence or absence of the police regulation. When the police conducted the search into the closed console of the automobile, the Fourth Amendment standard of reasonableness was breached.

The State has not argued that the search of the respondent's vehicle was one that was justified by one of the few well-delineated exceptions to the warrant requirement. In fact, the record clearly establishes that no exception to the warrant requirement existed in the instant case. The search which occurred in this case clearly fails to meet any established exception to the warrant requirement. Also, this search clearly fails to meet any standard of reasonableness set by the Fourth Amendment.

To hold otherwise would be to allow any governmental official the freedom to break and enter into the closed confines of a vehicle merely because the vehicle had been overparked.

The Supreme Court of South Dakota's holding that the inventory search which occurred in the instant case

did violate Fourth Amendment standards should be upheld.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-76

THE STATE OF SOUTH DAKOTA,

Petitioner,

vs.

DONALD OPPERMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONER, OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.

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TABLE OF CONTENTS.

PAGE

Table of Authorities ii

Motion for Leave to File a Brief *Amicus Curiae*, in Support of the Petitioner, of Americans for Effective Law Enforcement, Inc. 1

Interest of the *Amicus Curiae* 2

Brief *Amicus Curiae* in Support of the Petitioner 3

Summary of Facts 3

Question Presented 5

Argument

I. The Inventory of the Contents of a Lawfully Impounded Automobile Is a Proper Procedure for the Safeguarding of the Property of the Owner and the Protection of the Police 5

II. Items Coming Within the Plain View of the Police During the Inventory of the Contents of an Impounded Vehicle Should Be Admissible 12

Conclusion 16

TABLE OF AUTHORITIES.

Cases.

Almeida-Sanchez v. United States, 413 U. S. 266 (1973) 12, 13

Boulert v. Arizona, 17 Ariz. App. 64, rpt. as In re One 1965 Econoline, Etc., 495 P. 2d 504 (Ariz. App. 1972) 11, 12

Cady v. Dombrowski, 413 U. S. 433 (1973).....12, 13, 14

Cardwell v. Lewis, ____ U. S. ____, 94 S. Ct. 2464 (1974) 12, 13

Carroll v. U. S., 267 U. S. 132 (1925)..... 12

Cooper v. California, 386 U. S. 58 (1967).....13, 14

Harris v. United States, 390 U. S. 234 (1968).....14, 15, 16

In re One 1965 Econoline, Etc., 511 P. 2d 168 (Ariz. 1973) 11, 15

Mozzetti v. Superior Court, 4 Cal. 3d 384, 484 P. 2d 84 (Cal., 1971) 6, 7, 8, 11

State v. Opperman, 228 N. W. 2d 152 (S. D., 1975).... 5, 8

Terry v. Ohio, 392 U. S. 1 (1968)..... 10

Other.

Letter of Campbell, Earl, Police Chief's Office Phoenix, AZ Police Dept. July 29, 1974..... 11

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER.

Americans for Effective Law Enforcement, Inc., respectfully move this Court for leave to file a brief, *amicus curiae*, in support of the petitioner in the instant case. This motion is made pursuant to Rule 42 of the Supreme Court Rules. The petitioner has consented to our filing; the respondent has not responded to our request for consent to file. Accordingly, we are moving the Court directly for leave to file. A letter from counsel for the petitioner has been filed with the Clerk of this Court. The interest of the *amicus curiae* and our reasons for desiring to file are set forth below.

INTEREST OF THE AMICUS CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE), is a national, not-for-profit, non-partisan, non-political organization incorporated under the laws of the State of Illinois. As stated in its bylaws, the purposes of AELE are:

1. To explore and consider the needs and requirements for effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives, AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness in dealing with crime.

Amicus has as a primary and abiding interest the effectiveness of law enforcement in this country. The instant case presents a question of particular importance to law enforcement agencies and officers throughout the nation involving, as it does, a common and usual police procedure, performed hundreds of times each day across the country. Because this issue also involves a substantial area of potential civil liability on the part of police officers or agencies, *amicus* believes it is of particular importance in defining the permissible extent of daily police activity and is, hence, of particular importance to the entire law enforcement community.

IN THE

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THE STATE OF SOUTH DAKOTA,

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DONALD OPPERMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA.

BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONER.

Amicus will not reiterate the legal arguments made by the State of South Dakota in its brief, although we are in full agreement with them and wish to associate ourselves with them. Rather, *amicus* will attempt to analyze the factual questions presented in this case in the context of fundamental considerations which have immediate and important bearing on the everyday performance and effectiveness of law enforcement.

SUMMARY OF FACTS.

This case squarely presents the question of the admissibility of evidence discovered by the police of Vermillion, S. D., during the process of conducting an inventory of the contents of the

respondent's automobile. The particular item in question in this case, less than one ounce of marijuana, was among the contents of the unlocked glove compartment of the car.

The respondent's automobile, which was illegally parked for a period of at least seven hours in a downtown area, was towed away by the Vermillion police, presumably under the authorization of a local ordinance, and it was placed in an impound lot or area. When found, the car was locked and the windows were up. The police instructed the tow-truck operator to enter the car using a tool to unlock it, a procedure that would have been necessary, if for no other reason, than to release the brake or to place the transmission in a neutral position to effectuate the towing process. The acts of towing and impounding the automobile are not at issue in this case, nor is it argued that it was unreasonable to enter the locked vehicle. At the time the car was impounded, in accordance with the established procedure of the Vermillion Police Department, the impounding officer made a full inspection of the exterior of the car and, further, conducted an inventory of contents found within the interior of the car. As a part of the inventory, the officer opened the unlocked glove compartment, inside which the contraband at issue in this case was discovered in plain view in a plastic bag.

It is agreed that the respondent in this case had given no consent for the inventory. Indeed, under the facts stated by the court below, we must assume that the police did not then know where the respondent was. It is possible that they had not yet learned his identity. It is equally agreed that the inventory was conducted in accordance with well-established police policy and that the police had not the slightest reason to believe that the glove compartment of the car or any other part of the car contained the contraband actually discovered or any other form of contraband. Thus it seems clear that the Vermillion police had no probable cause to conduct a search of the interior of respondent's car or its glove compartment.

QUESTION PRESENTED.

This Court, therefore, must decide whether or not the inventory of the contents of a legally impounded automobile, carried out as an established police policy for the purposes of safeguarding the property within the vehicle and for the purpose of protecting the police against potential liability arising out of claims of loss or theft of such property, is a "search" and, if so, whether or not it is "reasonable" within the context of the Fourth Amendment. The Court must also decide, therefore, whether or not evidence of a crime, coming within the plain view of the police during such an inventory, may be admitted as evidence. It is a question which involves the everyday policies, practices, and procedures of police departments everywhere in the United States.

The South Dakota Supreme Court correctly stated that this Court has not decided whether or not an inventory procedure is a "search." *State* v. *Opperman*, 228 N. W. 2d 152, 153. That court however, stated, at 154, that "[l]ogic and well reasoned decisions from other jurisdictions lead us to conclude that an intrusion into a citizen's vechicle as in the instant case is a search." *Amicus* believes that the argument is essentially only one of semantics and that a rule of reason should apply to this question just as we will urge that a rule of reason should apply to the resolution of the issue of whether or not the warrant requirements of the Fourth Amendment must be applied to every such intrusion.

ARGUMENT.

I. The Inventory of the Contents of a Lawfully Impounded Automobile Is a Proper Procedure for the Safeguarding of the Property of the Owner and the Protection of the Police.

There are a number of valid and legitimate reasons for a police officer to impound an automobile and these instances are so numerous and common as to occur many times a day in large

urban areas, and frequently even in smaller population areas. For example, in most police jurisdictions an automobile will be impounded:

1. When the vehicle is subject to forfeiture under state or federal statutes as in certain narcotics, alcoholic beverage or firearms cases.
2. When the vehicle itself constitutes evidence, fruits or the instrumentality of a crime.
3. When the operator of the vehicle has been placed under lawful custodial arrest away from his premises and there is no other responsible individual present and authorized by the operator to assume responsible and lawful custody of the vehicle and its contents.
4. When, by virtue of abandonment, accident, or having been left unattended, the vehicle constitutes a hazard or impediment to traffic.
5. When by reason of intoxication, influence of drugs, illness or injury the operator is unable to drive the vehicle and there is no other person at hand who may assume lawful and responsible custody of the vehicle.
6. When the vehicle itself is in such condition as to be a hazard to traffic.

The foregoing are the standard situations under which vehicles are impounded by various jurisdictions and illustrate that the act of impoundment is not uncommon or unusual. There is a definite probability that the average police officer during his normal working day may be called upon to place a vehicle in police custody, whether by virtue of departmental regulation, municipal ordinance or by the exercise of reasonable prudent judgment. It is clear that in the vast majority of these circumstances, the vehicle and its contents will be returned to the rightful owner. It is therefore incumbent upon police agencies to protect and preserve both the vehicle and its contents for the benefit of the owner and that police officers may be civilly liable for failure to do so.

In *Mozzetti* v. *Superior Court*, 4 Cal. 3d 384, 484 P. 2d 84 (Cal., 1971), relied on heavily by the court below, the

California Supreme Court, in defining the duty owed to Sharon Mozzetti by the police to protect her property, resorted to a discussion of the California law of bailments and suggested that the police were merely "involuntary" or gratuitous bailees, assuming they did not impose a storage charge for the impoundment. That theory may be comforting to the policeman against whom a claim for loss of property is asserted, but to the vast majority of police officers, sworn as they are to protect the lives *and property* of the public, the notion that a police officer owes a portion of the public a degree of care less than owed by a launderer or parking lot attendant is incongruous. Indeed, the working policeman, entrusted, though involuntarily, with the safekeeping of the property of a citizen, is more likely to think of himself as a trustee of that property. *Amicus* would argue that sound public policy demands that police officers, when exercising custodial control, even for a brief period, over the property of private citizens, be held to a greater standard of care than that which would excuse all but gross negligence.

It begs the question to assert, as did the California court in *Mozzetti*, that the police can meet their duty to protect personal property in an impounded automobile "merely by rolling up the windows, locking the vehicle doors and returning the keys to the owner" because "[t]he owner himself, if required to leave his car temporarily, could do no more to protect his property." *Mozzetti* v. *Superior Court, supra,* at 417.

It also begs the question to assert, as did the court below, that the police officer's duty to safeguard the property contained within an impounded vehicle may extend to that which is found on the seats, the floor or the dashboard but somehow magically stops at the latch of an unlocked glove compartment, accessible to anyone by the mere flick of a wrist.

The police, faced with the daily necessity to protect such property, can, should and routinely do, exercise a higher degree of care than that urged in *Mozzetti* and by the South Dakota Supreme Court in the instant case.

In *Mozzetti, supra,* at p. 418, the California Supreme Court drew a subtle inference of police misuse of inventory procedures that was not sustained by the facts of the case. The language of the court is unmistakably clear in its implications:

> *It seems undeniable that a routine police inventory of the contents of an automobile involves a substantial invasion of the privacy of the vehicle owner. Regardless of* professed benevolent purposes *and* euphemistic explanation, *an inventory search involves a thorough* exploration *by the police into the private property of an individual.* (Emphasis added.)

The court further refers to "the prying eyes of the police." These words clearly suggest an improper purpose or, at the very least, a callous indifference to the rights of the citizen. The South Dakota Court in this case is no less suggestive of police subterfuge when it notes that a holding for the state "would lead to the encouragement of *fishing expeditions* and a whittling away of Fourth Amendment protection." (See *State* v. *Opperman, supra,* at 155.)

Yet there is no evidence in *Mozzetti* or in the instant case that would even hint at police impropriety of motive. That the inventory of personal effects left in an impounded vehicle is not, in fact, a probing to discover evidence, fruits or instrumentalities of a crime is, of course, a question of fact to be determined in each specific situation in which the issue is raised. But, as a general police practice, there is a great weight of evidence to indicate that inventories are not done for the purpose or with the intent of evading strict Fourth Amendment requirements.

In July of 1974, a request was sent by *amicus* to the nearly 200 law enforcement agencies that employ legal advisors, asking for statistics on inventories of impounded vehicles. It was learned that only a few departments keep statistical data on the number of inventories made. Only six departments, all varying in size, were able to completely reply to the survey, and the results appear in Table 1. These figures are for the year ended December 31, 1973. *Amicus* does not know of the existence of another survey of this type anywhere at any time.

TABLE I—POLICE INVENTORIES CONDUCTED.

Name of Agency and Jurisdiction	Number of Sworn Officers Employed	Approximate Number of Vehicles Inventoried Per Year	Estimated Number of Inventories Where Evidence Is Found
New York City Police Dept., N.Y.	30,827	20,694	800
Dallas Police Dept., Texas	1,875	38,500	6
Columbus Police Dept., Ohio	1,051	12,000	16
Las Vegas Metro Police Dept., Nev.	693	1,200	204
Metro Dade Co. Dept. of Public Safety, Miami, Fla.	1,464	14,367	359
Springfield Police Dept., Ohio	120	15	5
Total	36,030	86,776	1,390

As can be seen, approximately 86,776 vehicle inventories were conducted annually in the six police agencies listed above, and evidence of another offense (or contraband) was found in an estimated 1,390 of these cases. This is a combined total percentage of 1.6%.

It is therefore apparent, unless these statistics are not representative of the law enforcement community as a whole, that *very few vehicle inventories result in the discovery of other evidence or contraband.*

If it is thought that the police inventory procedures are a "subterfuge" for an otherwise illegal search, it is probably the most inefficient and unproductive trespass on the Fourth Amend-

ment ever conceived of by the police establishment. *Amicus* maintains that police inventory procedures are conducted for proper purposes—to reduce liability for disappearance of personal property and to protect such property for the benefit of vehicle occupants. The statistics gathered in this survey bear out this conclusion.[1]

It is conceded that the uniform application of a police policy or practice performed by all, or nearly all, police agencies will not serve to exempt that practice from constitutional restraints. The mere fact that an inventory is a routine police procedure or that it is "reasonable" in the context of judging everyday human behavior will not, it is likewise conceded, necessarily render the practice "reasonable" within the warrant requirements of the Fourth Amendment.

The fact remains, however, that in carving out exceptions to strict Fourth Amendment warrant requirements, courts *have* applied standards of everyday reasonableness and *have* balanced the need for the exception against the countervailing expectations of privacy. This Court certainly applied a rule of reason in sharply defining the "stop and frisk" exception found in *Terry* v. *Ohio*, 392, U. S. 1 (1968).

How compelling may be the need for a policy requiring officers to conduct inventories of impounded vehicles is a deci-

1. The results were certified by letters received from the legal advisors of each agency. The discrepancy in ratios between the size of the agency and number of vehicles inventoried is largely the result of differences in frequency of the use of impounding procedures. Variances in the ratio of cases where evidence is fortuitously found is probably based on the thoroughness of the inventory procedures utilized in each city. Agencies were asked to give the highest figure in the last category where their estimates were based on a numerical range. The high rate of instances where evidence is found in Las Vegas (and to a lesser extent in the Miami area) is thought to be due to the large number of transient visitors in these communities, who frequently lodge at a motor hotel and often keep items in their vehicles which they would normally put in their homes.

sion usually made at the command level of a police department and is, of course, a subjective judgment, resulting from the close scrutiny given most police policy decisions. In the survey of police departments conducted by *amicus* discussed at pages 8-10 *supra*, a representative of the Chief of Police of Phoenix, Arizona, while unable to furnish sufficient statistical data for inclusion in the survey, discussed that department's policy decision with respect to inventories. In his letter he noted that in 1972 the Arizona Court of Appeals had adopted the restrictive rule of *Mozzetti* v. *Superior Court, supra*, in an Arizona case, *Boulert* v. *Arizona*, 17 Ariz. App. 64, rpt. as *In re One 1965 Econoline Etc.*, 495 P. 2d 504 (Ariz. App., 1972). He then added:

> *Notwithstanding the Court of Appeals decision, the City of Phoenix Police Department decided that civil liability ramifications of not inventorying vehicles outweighed the loss of criminal cases; hence while we were precluded of using evidence found in a criminal prosecution, we continued to inventory automobiles to protect ourselves.*[2]

The judgment of the Phoenix police was fully vindicated by the Arizona Supreme Court which in 1973 reversed the Court of Appeals in the *Econoline* case. The Arizona Supreme Court said:

> *We do not agree with the rationale that while it is reasonable to inventory the vehicle in the first instance for those things which are in clear or plain view, it becomes unreasonable to inventory what is not in plain view. If one of the reasons for conducting the inventory is to safeguard valuables which might be present, it is illogical to prohibit law enforcement officials from searching those areas wherein valuables are most likely to be placed.* In re One 1965 Econoline, Etc., 511 P. 2d 168, 171 (Ariz., 1973).

2. Letter of Mr. Earl Campbell, Police Chief's Office, City of Phoenix Police Department, July 29, 1974. The original of this letter is in the files of Americans for Effective Law Enforcement, Inc.

In the application of the *Econoline* case and its practical effect on police conduct, we find in the action of the Phoenix police, a situation in which the sanctions of the Exclusionary Rule provided no deterrent whatever to a practice found to have been improper, at least for the time, by the Arizona Court of Appeals. *Amicus* cites this example to point out in the most graphic way that the practical, reasonable interests of professional law enforcement agencies, exercised in good faith, do not always lie on the side of prosecutions in situations in which an obligation to the public is felt to outweigh the need to prosecute.

Amicus urges, as suggested by the Arizona Supreme Court, that it is entirely reasonable for the police to conduct an inventory of the contents of a properly impounded vehicle and that it is equally reasonable for them to look into places where items of value will most likely be; in the glove compartment, the trunk or in containers within the car.

In these situations, application by the courts of the Exclusionary Rule serves no deterrent purposes whatsoever.

II. Items Coming Within the Plain View of the Police During the Inventory of the Contents of an Impounded Vehicle Should Be Admissible.

In a line of cases beginning with *Carroll* v. *United States*, 267 U. S. 132 (1925), and culminating with *Cady* v. *Dombrowski*, 413 U. S. 433 (1973), and *Cardwell* v. *Lewis*, ____ U. S. ____, 94 S. Ct. 2464 (1974), courts have held that a different standard of review is applied in automobile cases with respect to dispensing with the presumption that the absence of a warrant makes a search unreasonable.

> *The search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building.* Almeida-Sanchez v. United States, 413 U.S. 266, 279 (1973), (Powell, J. concurring.) *The Court's previous recognition of the distinction between motor vehicles and dwelling places leads us to conclude that the type of caretaking "search" conducted here of a vehicle that was neither in the custody nor on the premises of its owner and that had been placed where it was by virtue of lawful police action was not unreasonable solely because a warrant had not been obtained.* Cady v. Dombrowsky, 413 U.S. 433, 447-448 (1973). *One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny.* Cardwell v. Lewis, ____, U.S. ____, 94 S.Ct. 2464, 2469, 15 Cr.L. 3163, 3165 (1974).

Given the nearly uniform policies of police agencies in inventorying personal property in impounded autos, in conjunction with their duty to protect personal property, it can be reasonably assumed that there is virtually no expectation of privacy in a vehicle left abandoned or disabled or left by an operator who is unable to drive it. These are situations that lead to the bulk of all impoundments. The status of the impounded vehicle and the legitimate need to inventory its contents are not affected by the fact that the car was impounded only by reason of a parking violation. Indeed, the need to conduct an inventory in the latter case may be of a very high order because, at the outset, the police assume that the property will be returned to the rightful owner.

The South Dakota Supreme Court sought to distinguish the instant case from *Cooper* v. *California*, 386 U. S. 58 (1967), on the grounds that the *Cooper* inventory, found to be reasonable by this Court, was conducted after the automobile had been impounded because of the crime for which Cooper had been arrested and because it was subject to forfeiture. This is, of course, but one of many legitimate reasons for impoundment; yet is it not logical to view an inventory under such circum-

stances as being more nearly a search conducted for the purpose of discovering evidence or contraband than for the more beneficient purpose of safeguarding property which will be returned to the owner? It can hardly be argued that there is a different and lesser expectation of privacy involved in *Cooper* than in the instant case.

The Court below next sought to distinguish *Cady* v. *Dombrowski, supra,* first on the grounds that Dombrowski's automobile constituted a nuisance because it had been rendered inoperable due to an accident and that it could not be moved. Once again, the reason for impoundment is different but that difference is irrelevant to the issue before this Court since the reason for impounding Opperman's car is no less legitimate than that in either *Cooper* or *Cady*. It is merely a *different* reason. The second ground for distinction of the instant case from *Cady* was held to be the reason for the inventory—to search for Dombrowski's revolver, presumed to be in the car, to prevent it from falling into the wrong hands. To be sure, the Vermillion police had no reason to believe that Opperman's car contained any items that might constitute a threat to public safety. They had, indeed, no knowledge of *anything* that was in the car, dangerous, valuable, or otherwise. They could not know whether or not the unlocked and unprotected glove box contained a revolver, a packet of diamonds, or merely old highway maps *until they looked*. But the Court below has held that this dispassionate, neutral looking is unreasonable.

The final, and, as the South Dakota court stated, "perhaps for our purposes most relevant," distinction sought to be made is with *Harris* v. *United States,* 390 U. S. 234 (1968), a case which *amicus* also believes to be most relevant here though for different reasons. *Harris,* we agree, was based squarely upon the "plain view" exception to the warrant requirement. The Court states simply in its brief *per curiam* opinion "Once the door had lawfully been opened, the registration card with the name of the

robbery victim on it, was plainly visible. It has long been settled that objects falling in the plain view of an officer *who has a right to be in the position to have that view* are subject to seizure and may be introduced into evidence." 390 U. S. 234, 236.

Amicus contends that the Vermillion police officer was in a proper position when the evidence in this case came within his view. If, as the court below concedes, the officer had a right to unlock the car with a tool and to remove and inventory articles on the seats, floor or dashboard of the car, to be held for safekeeping and returned to the car owner, is it not a wholly artificial and arbitrary distinction to suggest that they must stop short of an unlocked glove compartment? Does the Court below suggest that the contents of the glove compartment are somehow safer than the contents of the interior of the car? *Amicus* suggests that reason and common sense require the adoption of the language of the Arizona Supreme Court in *Econoline, supra:*

> *We do not agree with the rationale that while it is reasonable to inventory the vehicle in the first instance for those things which are in clear or plain view, it becomes unreasonable to inventory what is not in plain view. If one of the reasons for conducting the inventory is to safeguard valuables which might be present, it is illogical to prohibit law enforcement officials from searching those areas wherein valuables are most likely to be placed.* 511 P.2d 168, 171 (Ariz., 1973).

Amicus argues that the logic of the Arizona Supreme Court is unassailable if the police officer is to properly safeguard the property of the citizens he serves and if he is to be protected against claims for loss of property alleged to be missing from impounded vehicles. Thus, we argue that the police had not just a right but a duty to open the glove compartment for the purpose of inventorying, and hence safeguarding, its unknown contents. Having a right to be in the position he was in, the Vermillion police officer then, under the rule set down in *Harris,* had a right to seize the evidence that came within his plain view.

Harris is a decision predicated upon reason whatever it may or may not say with respect to the usual police practice of conducting inventories of impounded vehicles. The facts of the instant case subject the opinion of the South Dakota Supreme Court, adversely we think, to precisely the same test of reason.

CONCLUSION.

Amicus urges the adoption of a reasonable and proper standard with respect to inventories of the contents of vehicles, namely, that police officers having lawfully taken an automobile into police custody, owe an affirmative duty to the owner of the automobile and its contents, and for their own protection against false or unreasonable claims, to protect the automobile *and its contents* from theft, vandalism or mischief. In furtherance of that duty they have a right, in good faith and without the prior issuance of a warrant, to make an inventory of all personal property contained in the automobile, its glove compartment, its trunk or within containers found therein and that having exercised that duty and right, any items coming within their plain and open view that may subsequently prove to be contraband or the fruits, instrumentalities, or evidence of another crime should, therefore, be admissible.

Amicus urges further that the duty of the police in such cases to protect the property of the public and to protect themselves from the potential liability posed by claims of loss is so substantial as to remove all deterrent effect from the application of the Exclusionary Rule.

Finally, *amicus* urges, whether or not this court accepts the policy arguments set forth above, that the facts of the instant case bring it squarely within the rule of *Harris* v. *United States, supra,* and that therefore the evidence found in the glove compartment of the respondent's impounded car was properly admitted by the trial court.

Accordingly, we ask this court to reverse the judgment of the South Dakota Supreme Court.

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IN THE

Supreme Court of the United States

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No. 75-76

STATE OF SOUTH DAKOTA,

Petitioner,

vs.

DONALD OPPERMAN,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of South Dakota.

Brief of Amicus Curiae State of California in Support of Petitioner.

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SUBJECT INDEX

Page

Interest of Amicus Curiae 1

Argument 3

The Standard Police Inventory of the Contents of Respondent's Lawfully Impounded Automobile Was Not an Unreasonable Search Because the Need for the Inventory Procedure Outbalanced the Gravity of the Invasion 3

A. The Well Recognized Need to Conduct Inventories of the Contents of Impounded Automobiles Is a Reasonable and Necessary Police Procedure 4

B. The Invasive Character of an Inventory Search of an Impounded Motor Vehicle Is Minimal in Nature Because of the Lesser Expectation of Privacy and the Benign Nature of the Search 10

Conclusion 21

TABLE OF AUTHORITIES CITED

Cases	Page
Alderman v. United States, 394 U.S. 165 (1969)	12
Berger v. New York, 388 U.S. 41 (1967)	10, 11
Cabbler v. Commonwealth, 212 Va. 520, 184 S.E. 2d 781 (1971)	4
Cady v. Dombrowski, 413 U.S. 433 (1973)	13, 14, 17, 18
Camara v. Municipal Court, 387 U.S. 523 (1969)	3
Cardwell v. Lewis, 417 U.S. 583	13, 15
City of St. Paul v. Myles, 298 Minn. 298, 218 N.W. 2d 697 (1974)	4, 5, 8, 16, 19
Cooper v. California, 386 U.S. 58 (1967)	9, 10, 14
Cupp v. Murphy, 412 U.S. 291 (1972)	8
Godbee v. State, 224 So. 2d 441 (Fla. App. 1969)	4, 19
Heffley v. State, 83 Nev. 100, 423 P. 2d 666 (1967)	4, 16
Katz v. United States, 389 U.S. 347 (1967)	10, 11, 15
Ker v. California, 374 U.S. 23 (1963)	4
Lopez v. United States, 373 U.S. 427 (1963)	11
Mozzetti v. Superior Court, 4 Cal. 3d 699, 484 P. 2d 84 (1971)	2, 6, 7, 8
Opperman v. State, 228 N.W. 2d 152 (1975)	6, 7, 8, 20
Oregon v. Hass, ... U.S. ....., 95 S. Ct. 1215 (1975)	2
People v. Krivda, 5 Cal.3d 357, 486 P. 2d 1262 (1971)	13

Cases	Page
People v. Sullivan, 29 N.Y. 2d 69, 323 N.Y.S. 2d 945, 272 N.E. 2d 464 (1971), reversing, 35 A.D. 2d 690, 315 N.Y.S. 2d 274 (1970)	3, 4, 16, 17, 19
People v. Trusty, ... Col. ....., 516 P. 2d 123 (1973)	4
People v. Willis, 46 Mich. App. 436, 208 N.W. 2d 204 (1973)	4, 5
Pigford v. United States, 273 A. 2d 837 (1971)	20
Preston v. United States, 376 U.S. 364 (1964)	3, 7
St. Clair v. State, 11 Md. App. 605, 232 A. 2d 565 (1967)	4, 9, 19
Silverman v. United States, 365 U.S. 505 (1961)	11
State v. Achter, ... Mo. ....., 512 S.W. 2d 894 (1974)	4
State v. Criscola, 21 Utah 2d 272, 444 P. 2d 517 (1968)	4
State v. Montague, 73 Wash. 2d 381, 438 P. 2d 571 (1968)	4, 16, 19
State v. Raiford, 7 Or. App. 302, 490 P. 2d 1036 (1971)	4
State v. Wallen, 185 Neb. 44, 173 N.W. 2d 372 (1970)	4, 19
Terry v. Ohio, 393 U.S. 1 (1968)	12
United States v. Edwards, 441 F. 2d 749 (5th Cir. 1971)	3
United States v. Fuller, 277 F. Supp. 97 (Dist. Ct. Dist. of Columbia 1967)	19
United States v. Fuller, 433 F. 2d 533 (D.C. Cir. 1970)	5

Page

United States v. Gerlach, 350 F. Supp. 180 (E.D. Mich. 1972) 19

United States v. Pennington, 441 F. 2d 249 (5th Cir. 1971), cert. denied 404 U.S. 854 (1971) 5

United States v. Sifuentes, 504 F. 2d 845 (4th Cir. 1974) 5

Warrix v. State, 50 Wis. 2d 368, 184 N.W. 2d 189 (1971) 4

Rules

Rules of the Supreme Court of the United States, Rule 42(4) 1

Statute

United States Constitution, Fourth Amendment 2, 3, 4, 11, 12, 15

Textbooks

Note, From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection, 43 N.Y.U. L. Review, pp. 968, 983-84 (1968) 12, 15

Note, "Warrantless Searches and Seizures of Automobiles," 87 Harv. L. Rev., pp. 835, 850, 851 (1974) 18

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Brief of Amicus Curiae State of California in Support of Petitioner.

Interest of Amicus Curiae.

The State of California through its Attorney General presents this brief as *amicus curiae* in support of petitioner pursuant to Rule 42(4) of the Rules of this Court. Petitioner is seeking to establish that a standard police inventory of the contents of a lawfully impounded automobile does not violate the Fourth Amendment of the United States Constitution. Since more motor vehicles are licensed in California than in any other state, California is deeply concerned that its law enforcement officers be allowed to inventory the contents of automobiles which they are required by law to impound: only through the inventory pro-

cedure may law officers protect themselves both from civil liability and from dangerous instrumentalities which may be contained in such vehicles. Although the California Supreme Court has held such inventory inspections to be violative of the Fourth Amendment in *Mozzetti v. Superior Court*, 4 Cal. 3d 699, 94 Cal. Rptr. 412, 484 P. 2d 84 (1971), the *Mozzetti* opinion is based entirely upon that Court's interpretation of the federal Constitution. Consequently, a decision by this Court construing the Constitution to allow such inventories would be authoritative in California. *See Oregon v. Hass,* ..... U.S. ....., 95 S. Ct. 1215, 1219 (1975).

ARGUMENT.

The Standard Police Inventory of the Contents of Respondent's Lawfully Impounded Automobile Was Not an Unreasonable Search Because the Need for the Inventory Procedure Outbalanced the Gravity of the Invasion.

The Fourth Amendment proscription of unreasonable searches and seizures applies to automobiles, and the standard with regard to automobiles is whether the search was reasonable under all the circumstances. *Preston v. United States,* 376 U.S. 364, 367 (1964). In assessing the elusive question of the reasonableness of a search,[1] this Court has formulated a "balancing test" to determine whether a search is reasonable under Fourth Amendment standards:

> ". . . [T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Camara v. Municipal Court,* 387 U.S. 523, 537 (1969).

When this test is applied to the "search" conducted in the instant case—a standard police inventory of the contents of a lawfully impounded automobile[2]—

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[1]"Like any rule of law that depends for its application upon the test of 'reasonableness,' the law of search and seizure cannot be applied with mathematical precision. . . . Modern courts find as much difficulty in ascertaining the reasonable search as our common law predecessors encountered in the search for the reasonable man." *United States v. Edwards,* 441 F. 2d 749, 751 (5th Cir. 1971).

[2]It has been suggested that the standard inventory examination is not truly a search in the Constitutional sense since the motivation for the examination is not to uncover incriminating evidence or contraband. See *People v. Sullivan,* 29 N.Y. 2d 69, 272 N.E. 2d 464, 468-69 (1971). Only when evidence

(This footnote is continued on next page)

there can be no question that the almost universally recognized need to inventory outweighs the minimal intrusion which the examination entailed.

A. The Well Recognized Need to Conduct Inventories of the Contents of Impounded Automobiles Is a Reasonable and Necessary Police Procedure.

The vast majority of courts which have ruled upon the question have concluded that the standard police inventory examination of the contents of lawfully impounded automobiles is a reasonable and necessary practice. *See State v. Achter,* ..... Mo. ....., 512 S.W. 2d 894 (1974); *City of St. Paul v. Myles,* 218 N.W. 2d 697 (Minn. 1974); *People v. Sullivan,* 29 N.Y. 2d 69, 323 N.Y.S. 2d 945, 272 N.E. 2d 464 (1971), reversing, 35 A.D. 2d 690, 315 N.Y.S. 2d 274 (1970); *State v. Raiford,* 7 Or. App. 302, 490 P. 2d 1036 (1971); *Cabbler v. Commonwealth,* 212 Va. 520, 184 S.E. 2d 781 (1971); *Warrix v. State,* 50 Wis. 2d 368, 184 N.W. 2d 189 (1971); *State v. Wallen,* 185 Neb. 44, 173 N.W. 2d 372 (1970); *Godbee v. State,* 224 So. 2d 441 (Fla. App. 1969); *State v. Criscola,* 21 Utah 2d 272, 444 P. 2d 517 (1968); *State v. Montague,* 73 Wash. 2d 381, 438 P. 2d 571 (1968); *St. Clair v. State,* 11 Md. App. 605, 232 A. 2d 565 (1967); *Heffley v. State,* 83 Nev. 100, 423 P. 2d 666 (1967); *People v. Trusty,* ..... Col. ....., 516 P. 2d 123 (1973); *People*

is inadvertently discovered during such an inventory (as was the contraband in the instant case) is the legality of the procedure question. There is a strong analogy here to the "plain view" cases, which have held that the inadvertent discovery of contraband or evidence falling into the view of an officer who is in a place he has a right to be does not constitute a search within the meaning of the Fourth Amendment. *See Ker v. California,* 374 U.S. 23, 43 (1963).

v. Willis, 46 Mich. App. 436, 208 N.W. 2d 204 (1973); *United States v. Pennington,* 441 F. 2d 249 (5th Cir. 1971), cert. denied 404 U.S. 854 (1971); *United States v. Fuller,* 433 F. 2d 533 (D.C. Cir. 1970); *United States v. Sifuentes,* 504 F. 2d 845 (4th Cir. 1974). The views of those courts can be summarized by a representative passage from the decision of the Minnesota Supreme Court in *City of St. Paul v. Myles,* 298 Minn. 298, 218 N.W. 2d 697, 699 (1974):

> "We hold that a standard police procedure of inventorying the contents in an impounded vehicle is reasonable and therefore not constitutionally improper if performed without a warrant. In reaching this conclusion, we note that the search was not a probing, exploratory search conducted solely for the purpose of discovering evidence of other crimes. On the contrary, this standard police procedure is conducted to protect the property of the owner of the vehicle from loss or theft during the period of impoundment. Such safeguards taken with the objective of guarding the owner's possessions in his absence are commendable. The procedure also should be a great help in preventing false claims of loss from being successfully pursued in situations similar to those present in this case."

The United States Court of Appeals for the Fifth Circuit has held that "the only reasonable method" for safeguarding valuables contained in a lawfully impounded vehicle is "to inventory the contents and take receipts from the person who is thereafter to be responsible." *United States v. Pennington,* 441 F. 2d 249, 252 (5th Cir. 1971).

Significantly, in two of the leading cases in which the courts have excluded evidence seized pursuant to inventory examinations, those courts have conceded the legitimate purpose of the standard inventory but have restricted the scope of the inventory to items falling into the plain view of the inventorying authorities. *See Opperman v. State,* 228 N.W. 2d 152, 158-59 (1975); *Mozzetti v. Superior Court,* 4 Cal. 3d 699, 707, 484 P. 2d 84, 89 (1971). Both the Supreme Court of South Dakota, in the instant case, and the California Supreme Court, in *Mozzetti, supra,* recognized the propriety of law enforcement officials taking note for inventory purposes of personal property in plain sight within the impounded vehicle. However, both courts rejected the claim that the inventory *into closed areas* within the vehicle was necessary for the protection of the police and of the owners of the vehicles. *Id. Amicus* submits that the rationales adopted by those two courts in restricting the inventories to items in plain view do not stand up to close scrutiny.

In *Mozzetti,* the Court refused to accept the premise that an inventory if items within closed areas inside an impounded vehicle was necessary for the benefit of the vehicle's owner. Referring to a long line of California lower court decisions in which evidence found during standard police inventories was held admissible in criminal proceedings, the Court reasoned that "there is little doubt that all of them [owners of the impounded vehicles] would have preferred, for the protection of their property, that the police simply lock the doors, rather than search the contents of their cars." 484 P. 2d at 89.

The fallacy in the Court's reasoning is obvious. The reasonableness of the inventory procedure cannot

seriously be gauged by referring to the retrospective judgment of a group which was effectively prosecuted with evidence discovered by virtue of that procedure. The question is whether the search was reasonable under all the circumstances (*Preston v. United States,* 376 U.S. 364, 367 (1964)), not whether persons inadvertently apprehended as a result of the procedure would have approved of it.

The *Mozzetti* court also rejected the contention that a police inventory into closed areas of the impounded vehicle was necessary to protect the police and the storage bailee from tort claims. Asserting that as involuntary bailees the police are held to only a "slight duty of care," the Court stated that, "In no case was an inventory of items not within plain sight essential to safeguard the contents or to fulfill a "slight duty of care." 484 P. 2d at 90. The reasoning of the California court was adopted by the Supreme Court of South Dakota in the instant case. *State v. Opperman,* 228 N.W. 2d 152, 159 (1975).

Amicus submits that this rationale for prohibiting the police inventory of items within closed compartments of an impounded vehicle is unconvincing. By recognizing the propriety of an inventory of those items within plain view in the interior of the car, the *Mozzetti* court implicitly recognized the realistic possibility that the vehicle could be broken into and those items stolen. Obviously, if the vehicle itself could be burglarized, it is equally possible that the glove compartment or console of the vehicle could be opened and valuables removed. Under these circumstances, to contend that the inventory of items in plain view is more reasonable than an inventory of items within the glove compartment is not convincing. And if a failure to inventory items in plain view might amount to a breach of the "slight

duty of care," a similar failure to inventory items in closed areas would constitute an equivalent breach.

Moreover, the decisions in *Mozzetti* and *Opperman* fail to deal with the issue of false claims. A false claim would certainly not be restricted only to those items in plain view within the interior of the vehicle, but could equally as well relate to items alleged to have been contained within the closed compartments of the car. The only reasonable way for the police to protect themselves from such false claims is for them to inventory all items with the vehicle, including any valuables contained within closed compartments. This protective view was adopted by the Minnesota Supreme Court:

> "The police could be held responsible if valuables in a car under their control were stolen. Removal of these valuables for storage in the police property room removes most of this risk. In addition, an inventory, while not a guarantee against untimely claims of loss, is evidence the police can use to establish that a claim is false." *City of St. Paul v. Myles, supra,* 218 N.W. 2d at 701.

The scope of a warrantless search must be commensurate with the rationale that excepts the search from the warrant requirement. *Cupp v. Murphy,* 412 U.S. 291, 295 (1972). The purpose of the inventory examination is to protect the property with the motor vehicle for both the owner of the vehicle and for the police as involuntary bailees. This rationale would certainly include all valuables with the vehicle, including those

items which might be contained within closed compartments.[8]

Finally, this Court has itself recognized the necessity of police impoundment examinations. In *Cooper v. California,* 386 U.S. 58 (1967), Cooper had been arrested for a narcotics violation and his vehicle impounded pursuant to a California statute which authorized the seizure of any vehicle used unlawfully to transport narcotics. The vehicle was subsequently inventoried and incriminating evidence was found. This Court reasoned that,

> "The forfeiture of petitioner's car did not take place until over four months after it was lawfully seized. It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it." *Id.* at 61-62.

The reference to "protection" in the above passage can have two possible interpretations. First, it can refer to the physical safety of the officers, as where the vehicle might contain explosives or other dangerous instrumentalities. Secondly, it can refer to the protection

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[8]This rule would aid in assuring that a lawful inventory examination could not be used as a mere subterfuge for a prohibited exploratory search. A search beneath the vehicle's floorboards, for example, would almost certainly be incommensurate with the purposes of the standard inventory. The question of whether an inventory was being used as a mere pretext should, in each case, be left to the factual determination of the trial court and, if the court finds that the inventory was a subterfuge for illegality, the evidence seized should be excluded. See *St. Clair v. State,* 1 Md. App. 605, 232 A. 2d 565, 573 (1967).

of the officers from false tort claims being submitted by the owner of the vehicle. In either case, the rationale is equally applicable to the standard inventory conducted in the case at bar. It is clear that the safety rationale adopted in *Cooper* was not restricted to items within plain view since the incriminating evidence in *Cooper* was retrieved from the glove compartment of the vehicle. Nor does the four-month period of custody effectively distinguish the situation in *Cooper* from that in the instant case since there was no way to predict how long the police would retain respondent's illegally parked vehicle before he decided to claim it.

In sum, *amicus* State of California submits that the legitimacy of the need for police inventory examinations of impounded vehicles has been recognized by this Court, by the majority of state courts which have considered the question, and even by the Supreme Courts of South Dakota and California, although the latter two courts have irrationally restricted inventories to items in plain view within the vehicle. Insofar as the valid need to inventory exists, that need is as applicable to items contained in the glove compartment, console, or other closed areas where valuables are customarily kept as it is to items in plain view.

B. The Invasive Character of an Inventory Search of an Impounded Motor Vehicle Is Minimal in Nature Because of the Lesser Expectation of Privacy and the Benign Nature of the Search.

Prior to *Katz v. United States*, 389 U.S. 347 (1967), the search and seizure decisions of this Court focused on whether the location searched was a "constitutionally protected area." *See, e.g., Berger v. New York*,

388 U.S. 41, 57, 59 (1967); *Lopez v. United States*, 373 U.S. 427, 438-39 (1963); *Silverman v. United States*, 365 U.S. 505, 510, 512 (1961). In *Katz*, this Court rejected this prior analysis and stated,

> ". . . The correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area'. . . .
>
> "[O]nce it is recognized that the Fourth Amendment protects people—and not simply areas—against unreasonable searches and seizures, it becomes clear that the breach of that amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." 389 U.S. at 350, 353.

The concurring opinion of Mr. Justice Harlan in *Katz* has served to specifically express the view that search and seizure questions under the Fourth Amendment will be resolved by an individual's "reasonable expectation of privacy." *Id.* at 360. His concurring opinion explains this phrase in these terms:

> ". . . My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited." *Id.* at 361.

Justice Harlan's test of "reasonable expectations of privacy" has since been adopted by the majority of this Court in several subsequent decisions. *Terry v. Ohio,* 393 U.S. 1, 9 (1968); *Alderman v. United States,* 394 U.S. 165, 179, n.11 (1969).

Amicus submits that the "reasonable expectation of privacy" that an individual has to his automobile and the enclosed area of that automobile (*i.e.,* glove compartment, console) is, by virtue of conditions of modern life, minimal in nature.

It has been suggested that three factors should be considered in determining whether persons claiming Fourth Amendment protection haver a reasonable expectation of privacy warranting such protection. The three factors are, (1) the nature of the intended area of private control, (2) the defendant's right to exclusive use of that area or facility, and (3) the degree to which society honors the intimacy or privacy of the activity normally carried on in such a place. *See* Note, From Private Places to Personal Privacy: A Post-*Katz* Study of Fourth Amendment Protection, 43 N.Y.U. L. Review 968, 983-84 (1968). When this three-pronged test is applied to the automobile console-glove compartment examined in the instant case, it is clear that the expectation of privacy is relatively negligible.

In determining the "nature of the intended area of private control," an enclosed area must, by necessity, take on the many of characteristics of its surroundings. A desk drawer located in a desk within a home would clearly enjoy the Fourth Amendment protections which had been afforded a home, protections which might very well not be afforded a desk drawer in a desk abandoned on the street. Likewise, the enclosed areas

within a motor vehicle must take on the characteristics of that vehicle. There is no question but that an automobile enjoys a lesser expectation of a privacy than a home. As stated by Mr. Justice Blackmun in *Cardwell v. Lewis,* 417 U.S. 583,

> "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the depository of personal effects." *Id.* at 590.

The second prong in the above-mentioned test of reasonable expectation of privacy is whether the claimant had a right to exclusive use of the area searched or the things seized. It is arguable that closed areas within a motor vehicle are subject to the exclusive use of the driver or owner of that vehicle. However,

> ". . . One must reasonably anticipate under certain circumstances third persons may invade his privacy to some extent." *People v. Krivda,* 5 Cal. 3d 357, 367, 486 P. 2d 1262, 1269 (1971).

Amicus submits that one should reasonably anticipate that closed areas within a motor vehicle might, considering the realities of modern life, he invaded under certain circumstances. The reason for such an expectation was cogently stated by Mr. Justice Rhenquist for the Court in *Cady v. Dombrowski,* 413 U.S. 433 (1973):

> "Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police—citizen contact involving automobiles will be substantially greater than police—citizen contact in a home or office. Some

such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidencer relating to the violation of a criminal state." *Id.*, 413 U.S. at 441.

This frequent contact between motor vehicles and police officers readily suggests several circumstances in which enclosed areas within a motor vehicle might be invaded. Such circumstances would include a vehicular accident, where officers enter into a glove compartment or console of that vehicle for information that would assist them in securing medical aid for a driver. Another situation is where the driver of a vehicle is arrested for a drug offense and, because of automobile forfeiture proceedings, the vehicle must be impounded with the concomitant inventory search of that vehicle into its enclosed areas. *See Cooper v. California, supra,* 386 U.S. 58 (1967). A third situation, such as occurred in the case at bar, is when a driver neglects his vehicle in violation of municipal parking ordinances and that vehicle is impounded and subsequently inventoried. These situations are commonplace realities of modern life and would suggest to any reasonable person that the enclosed areas of his motor vehicle might be invaded. Consequently, the operator of a motor vehicle does not enjoy the same expectation of privacy and exclusive use of the enclosed

areas of a motor vehicle that would be attendant with regard to the enclosed area of his home.

The third prong of the test is "the degree to which society honors the intimacy or privacy of the activity normally carried in such a place." *Note, supra,* 43 N.Y.U.L. Rev. at 984. Since virtualy every governmental action interferes with personal privacy to some degree, the question in each is whether that interference violates a command of the United States Constitution. *Katz v. United States, supra,* 389 U.S. 350 n.5. For this reason, it is necessary that ". . . the individual's otherwise reasonable expectation of privacy be buttressed by social norms; the intended walls of privacy must have some objective validity." Note, *supra,* 43 N.Y.U.L. Rev. at 984.

Amicus submits that the society is not prepared to recognize one's unequivocal expectation of privacy with regard to the enclosed areas within a motor vehicle. This proposition is clearly supported by the language in *Cardwell v. Lewis, supra,* 417 U.S. 583 (1973), wherein this Court recognized that the motor vehicle seldom serves as a repository of peersonal effects. *Id.*, 417 U.S. at 590. Since a motor vehicle is not a normal repository of personal effects, it seems unlikely that society recognizes an unequivocal expectation of privacy as to the enclosed areas of a motor vehicle. Presumably, it is because of the very real possibility of invasion that people refuse to entrust their personal effects to these areas.

The majority of courts that have considered the issue of whether warrantless inventory searches of impounded automobiles is reasonable under the Fourth Amendment have clearly recognized the distinction be-

tween homes and automobiles and, implicitly, the notion that one has a lesser expectation of privacy as to a motor vehicle, including the enclosed areas of that vehicle. *See City of St. Paul v. Myles,* 218 N.W. 2d 697 (Minn. 1974); *People v. Sullivan,* 29 N.Y. 2d 69, 323 N.Y.S. 2d 945, 272 N.E. 2d 464 (1971), *reversing,* 35 A.D. 2d 690, 315 N.Y.S. 2d 274 (1970); *State v. Montague,* 73 Wash. 2d 381, 438 P. 2d 571 (1968); *Heffley v. State,* 83 Nev. 100, 423 P. 2d 666 (1967).

Furthermore, one has an even lesser expectation of privacy in the circumstances presented in the case at bar, where respondent neglected his motor vehicle to the extent that that vehicle was subject to impoundment for violation of municipal parking ordinances. Such neglect can be considered as approaching abandonment of the vehicle and the contents therein. This concept was explored by the New York Court of Appeals in *People v. Sullivan,* 29 N.Y. 2d 69, 272 N.E. 2d 464, where the court stated:

> "A motor vehicle has been afforded some of the protections against 'unreasonable' searches that traditionally were allowed to a man's home. Yet the vehicle is still a chattel. Given its high mobility it may be left by the owner in places where its presence conflicts with public and private rights of others; and what may be done with it by public authority depends ultimately on a balancing of conflicting community and personal interests.
>
> "When a man willfully leaves a car unattended under a 'tow-away' sign through a time and at a place where all parking is prohibited, and in a city where removal of vehicles for the safety of streets is so widespread and so thoroughly publicized as in New York City, he is not far from risking its abandonment to removal, or indeed from an open invitation to authorities to remove it." 272 N.E. 2d at 465 (emphasis added).

The proposition that neglect of a vehicle is tantamount to abandonment was recognized by this Court in *Cady v. Dombrowski,* 413 U.S. 433 (1972). In that case the Court noted that,

> "These officers in a rural area were simply reacting to the effect of an accident—one of the recurring practical situations that result from the operation of motor vehicles and with which local police officers must deal every day. The Thunderbird was not parked adjacent to the dwelling place of the owner as in Coolidge v. New Hampshire, 403 U.S. 443 (1971), nor simply momentarily unoccupied on a street. Rather, like in *obviously abandoned vehicle* it represented a nuisance, and there is no suggestion in the record that the officer's action in exercising control over it by having it towed away was unwarranted either in terms of state law or sound police procedure." 413 U.S. at 446, 447 (Emphasis added).

The facts in the case at bar are similar to those in *Cady.* Like *Cady,* the towaway of Mr. Opperman's car was a recurring practical event that results from the operation of motor vehicles and with which local police officers in Ver Million must deal with every day. Also, like *Cady,* there is nothing in the record to suggest that this vehicle was parked adjacent to the dwelling place of the owner. Moreover, it is clear that the vehicle was not momentarily unoccupied on the street. The vehicle was first ticketed at 3

a.m. and again at 10 a.m. on the same day. Consequently, the motor vehicle in the case at bar represented, like the vehicle in *Cady*, a nuisance which was tantamount to an abandoned vehicle.

Moreover, the gravity of the invasion necessitated by an inventory examination of an impounded motor vehicle is minimized by the benign character of such a search. In *Cady, supra,* the Court observed that the distinction between motor vehicles and dwelling places leads to the conclusion that the "caretaking search" conducted in that case was not unreasonable solely because a warrant had not been obtained. 413 U.S. 433 at 447, 448. Discussing these community caretaking functions, the court noted that such functions are totally divorced from the detection, investigation or acquisition of evidence relating to the violation of a criminal statute. 413 U.S. at 441. *Amicus* submits that an inventory examination is just such community caretaking function, which does not have as its motivation the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. Therefore, the benign character of the inventory is a factor which renders the intrusive character of the search minimal in nature and tips the scales toward the conclusion that the search was reasonable. *See* Note, "Warrantless Searches and Seizures of Automobiles," 87 Harv. L. Rev. 835, 850, 851 (1974).

Several courts that have considered the issue of the reasonableness of the standard inventory examination of impounded motor vehicles have placed considerable emphasis on the benign character of such a search. As pointed out in *People v. Sullivan,* 272 N.E. 2d 464:

> "It is manifest that in inspecting vehicles they take into their custody in the absence of drivers, the police are not seeking evidence of crime but are pursuing precautions which any bailee of personal property would be expected to take as a matter of reasonable care for the benefit of the absent owner of the vehicle and as a safeguard against claims of loss or damage which could be alleged against the city. . . .
>
> "No . . . direct nexus between an inspection and an intent to prosecute, directly related to the seizure, is shown. Here the impounding of the vehicle was undertaken without regard to any possible prosecution and physical custody was neither necessary nor useful in the parking violation itself. Its purpose was to promote public safety and to facilitate the flow of traffic. This was not then, an 'unreasonable' search." *Id.,* 272 N.E. 2d at 465, 469. *See also United States v. Gerlach,* 350 F. Supp. 180 (E.D. Mich. 1972); *State v. Montague,* 438 P. 2d 571; *City of St. Paul v. Myles,* 218 N.W. 2d 697 (Minn. 1974); *State v. Wallen,* 185 Neb. 44, 173 N.W. 2d 372 (1970); *Godbee v. State,* 224 So. 2d 441 (Fla. App. 1969); *St. Clair v. State,* 11 Md. App. 605, 232 A. 2d 565 (1967); *United States v. Fuller,* 277 F. Supp. 97, 100 (Dist. Ct. Dist. of Columbia 1967).

Indeed, the lack of a benign purpose has been held by some courts to be the only legitimate reason for invalidating a warrantless inventory search of an im-

pounded motor vehicle. *See Pigford v. United States,* 273 A. 2d 837, 839, 840 (1971).

It is clear that in the case at bar the purpose of the inventory search was benign. There was clearly no intent to circumvent warrant requirements. As stated in the dissenting opinion of Justice Wollman,

> "The officer who conducted the inspection and inventory testified that all vehicles taken to the impoundment lot are inventoried against the standard inventory sheet. This is done because in the past instances property has been stolen from locked cars in the impoundment lot. The officer testified that he had never seen defendant's vehicle before, that he did not know defendant, and that he had no reason to suspect that the automobile might contain drugs." *State v. Opperman,* 228 N.W. 2d 152, 159-60 (1975).

Amicus thus submits that the benign, non-exploratory character of inventory searches of impounded motor vehicles minimizes the gravity of the invasion involved in such a procedure. This factor, coupled with the minimal expectation of privacy one holds in an illegally parked automobile clearly suggest that the gravity of the invasion is itself minimal in nature.

Conclusion.

The need to conduct warrantless inventory searches of impounded vehicles, including the closed areas of the vehicle, is well recognized and legitimate. This need clearly outweighs the gravity of the invasion which such a procedure entails considering the minimal expectation of privacy involved with a motor vehicle and the benign, non-exploratory purpose of such a search. Consequently, *amicus curiae* State of California joins petitioner State of South Dakota in urging that the judgment of the South Dakota Supreme Court be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

1975 TERM

No. 75-76

STATE OF SOUTH DAKOTA,

Petitioner,

vs.

DONALD OPPERMAN,

Respondent.

BRIEF ON THE MERITS IN SUPPORT OF PETITIONER SUBMITTED AMICUS CURIAE BY THE STATE OF INDIANA

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Opinion Below	2
Jurisdiction	2
Consent of the Parties	2
Question Presented	2
Constitutional Provisions Involved	2
Interest of the Amicus	3
Statement of the Case	3
Argument	4
Conclusion	11

TABLE OF AUTHORITIES

Cases

Page

Cady v. Dombrowski, 413 U.S. 433 (1973) ...6, 7, 8, 9, 10, 11

Cooper v. California, 386 U.S. 58 (1967) 9, 10, 11

Harris v. United States, 390 U.S. 234 (1968) 9, 11

Preston v. United States, 376 U.S. 364 (1964) 5

State of South Dakota v. Opperman, (S.D., 1975) 228 N.W. 2d 152 .....2, 4, 7, 8, 9

United States v. Biswell, 406 U.S. 311 (1972) 10

Constitutional and Statutory Provisions

Fourth Amendment to the Constitution of the United States 2, 4, 11

28 U.S.C. §1257 (3) 2

Other Authorities

Rule 42 of the Rules of the Supreme Court of the United States 1, 2

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1975 TERM

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STATE OF SOUTH DAKOTA,
Petitioner,

vs.

DONALD OPPERMAN,
Respondent.

BRIEF ON THE MERITS IN SUPPORT OF PETITIONER SUBMITTED AMICUS CURIAE BY THE STATE OF INDIANA

The State of Indiana, by Theodore L. Sendak, Attorney General of Indiana, and Donald P. Bogard, Executive Assistant Attorney General, pursuant to Rule 42 of the Rules of the Supreme Court of the United States, submits its *amicus curiae* brief on the merits in support of the Petitioner in the above-entitled cause.

OPINION BELOW

The opinion of the Supreme Court of South Dakota is reported as *State of South Dakota v. Opperman,* (S.D. 1975) 228 N.W. 2d 152, and may be found as Appendix A attached to the Petition for Writ of Certiorari.

JURISDICTION

This Court has jurisdiction to review this cause by writ of certiorari pursuant to 28 U.S.C. §1257 (3), and has accepted it for such purposes by granting said writ on November 3, 1975.

CONSENT OF THE PARTIES

The *amicus curiae* brief is filed by the State of Indiana pursuant to Rule 42 of the Rules of this Court and consent of the parties is not required pursuant to Rule 42 (4).

QUESTION PRESENTED

Whether the South Dakota Supreme Court erred in holding that certain evidence found in the glove compartment of a vehicle during a lawful inventory of the contents of the vehicle by police, which inventory followed the impoundment of the vehicle for parking violations, was inadmissible on the ground that the inventory was an illegal search under the Fourth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

INTEREST OF THE AMICUS

The State of Indiana submits this brief since the question presented by the State of South Dakota is equally vital to Indiana and all other states in the Union. The decision of the Supreme Court of South Dakota on the question presented is contrary to the weight of authority from this Court.

This case involves the attempted exclusion of evidence in a state court proceeding. The evidence was obtained during an inventory of the items in a vehicle that had been lawfully towed to the impounding lot of the City of Vermillion, South Dakota, following multiple parking violations. The trial court held that the evidence was admissible but the Supreme Court of South Dakota reversed.

If the decision of the Supreme Court of South Dakota is affirmed by this Court, then the various police agencies in Indiana would be seriously hampered in their ability to protect the safekeeping of items of property contained in vehicles under their control, and in their ability to protect themselves from claims arising from allegations of loss of items contained in those vehicles.

STATEMENT OF THE CASE

The *amicus* accepts and adopts the "Statement of the Case" contained in Petitioner's brief on the merits.

ARGUMENT

EVIDENCE FOUND IN THE GLOVE COMPARTMENT OF A VEHICLE DURING A LAWFUL INVENTORY OF THE CONTENTS OF THE VEHICLE BY POLICE FOLLOWING IMPOUNDMENT OF THE VEHICLE FOR PARKING VIOLATIONS IS ADMISSIBLE AND IS NOT EVIDENCE OBTAINED BY AN ILLEGAL SEARCH IN VIOLATION OF THE FOURTH AMENDMENT.

This review arose from the case of *State of South Dakota v. Opperman, supra,* wherein the Supreme Court of South Dakota held that an inventory of items in a vehicle impounded for parking violations was an unreasonable search under the Fourth Amendment, and that evidence thus obtained must be excluded from a criminal prosecution. 228 N.W. 2d at 159.

In this case the Vermillion, South Dakota, City Police observed the Respondent's automobile parked, during the early morning hours, in a zone where parking was prohibited by city ordinance at that time of day. Approximately seven hours later the automobile was again ticketed by Police for an expired parking meter violation. The vehicle was reported to the Police Station, and after investigation by Officer Frank from the station, it was towed to the city impounding lot.

The impounding lot had been the scene of past incidents of theft from locked automobiles, and Officer Frank, observing a watch and numerous other items inside the car, inventoried the contents pursuant to standard police

department procedure. During the inventory Officer Frank opened the unlocked glove compartment and discovered a small quantity of marijuana.

At 5:00 P.M. the same day, the Respondent, who was the registered owner of the vehicle, appeared at the Police Station and claimed the items that were not seized. He was arrested ten days later and charged with possession of less than one ounce of marijuana. Upon conviction of that offense he appealed to the Supreme Court of South Dakota, which reversed the trial court.

It is well settled that the reasonableness of any search must be determined on a case by case basis, examining the specific facts therein. *Preston v. United States,* 376 U.S. 364 (1964). Although this Court has not ruled on the precise question presented herein, the *Amicus* submits that the decisions of this Court, and the facts in this case, clearly reveal that the Supreme Court of South Dakota erred in its decision.

In *Preston v. United States, supra,* this Court stated at pages 366 and 367:

> "... Our cases make it clear that searches of motorcars must meet the test of reasonableness under the Fourth Amendment before evidence obtained as a result of such searches is admissible. E.g., Carroll v. United States, 267 U.S. 132 (1925); Brinegar v. United States, 338 U.S. 160 (1949). Common sense dictates, of course, that questions involving searches of motorcars or other things readily moved cannot be treated as identical to questions arising out of searches of fixed structures like houses. For this reason, what may be an unreasonable search of a house may be reasonable in the case of a motorcar. See Carroll v. United States, supra, 267 U.S., at 153. *But even in the case of motorcars, the test still is, was the search unreasonable.*" (Emphasis supplied.)

This case centers around a standard police operating procedure—the inventory of articles contained in an impounded automobile. There was no assertion by the Respondent herein that the procedure was extraordinary for the Vermillion Police Department. Likewise, in holding the inventory an "unreasonable search," the Supreme Court of South Dakota did not conclude that the inventory procedure was anything other than standard, departmental procedure.

In *Cady v. Dombrowski*, 413 U.S. 433 (1973), the respondent, an off-duty Chicago police officer, wrecked a rented Thunderbird. The respondent appeared drunk, so the local police had the vehicle towed to a garage. Unable to find the respondent's service revolver which the local police believed the respondent was required to wear at all times, the police searched the automobile, including the locked trunk, wherein they found several bloody items which later led to the respondent's arrest for murder. This Court stated at pages 446 and 447:

> ". . . The Thunderbird was not parked adjacent to the dwelling place of the owner as in Coolidge v. New Hampshire, 403 U.S. 443, (1971), nor simply momentarily unoccupied on a street. Rather, like an obviously abandoned vehicle, it represented a nuisance, and there is no suggestion in the record that the officers' action in exercising control over it by having it towed away was unwarranted either in terms of state law or sound police procedure."

In further commenting on the duties and functions of local police which are deemed "sound police procedure," this Court stated at page 441:

> ". . . Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."

And further, at page 443:

> ". . . Particularly in nonmetropolitan jurisdictions such as those involved here, enforcement of the traffic laws and supervision of vehicle traffic may be a large part of a police officer's job. We believe that the Court of Appeals should have accepted, as did the state courts and the District Court, the findings with respect to Officer Weiss' specific motivation and the fact that the procedure he followed was 'standard.'"

The Supreme Court of South Dakota attempted to minimize the importance of *Cady* by stating that "vast factual distinctions separated the case at bar from Cady." 228 N.W.2d at 157. However, in attempting to distinguish the facts, the *Amicus* asserts that that Court drew distinctions where none in fact existed. For example, the Court stated that the Respondent's automobile was not located where it was a public nuisance. The record clearly shows that the vehicle was parked in a prohibited zone although the state Supreme Court said that the car was parked in a "designated parking space." 228 N.W.2d at 157. Clearly, an automobile parked in a zone in which the City of Vermillion prohibited parking was a "public nuisance."

In addition, that state court stated:

> ". . . The record offers no reasons why petitioner [Respondent herein] could not arrange for the safekeeping of his vehicle *at the time or after it was towed from where it had been parked.*" (Emphasis supplied.) 228 N.W.2d at 157.

The record shows that the Respondent abandoned his automobile and did not claim it for at least fourteen hours after it was initially ticketed. It was certainly not incumbent upon the Vermillion Police Department to leave the vehicle where it was and search out the owner to see if he would move the vehicle. Even if the Respondent had had difficulty starting the auto during the early morning hours, it was still abandoned in mid-morning when it was reticketed at 10:00 A.M. and then towed away sometime subsequent to further investigation by Officer Frank.

The Supreme Court of South Dakota further "distinguishes" *Cady* by stating:

> ". . . most importantly, there was no reason for the Vermillion police to believe that the car contained anything which posed a potential threat to the public safety." 228 N.W.2d at 157.

That Court had absolutely no difficulty in accepting a search in *Cady* for a revolver that *never* was shown to exist. In fact, the only justification for the search in *Cady* was that the Kewaskum, Wisconsin policemen "believed" that the Chicago policeman was required to wear his service revolver at all times. 228 N.W.2d at 157.

Here, the Vermillion police were simply inventorying all items in the vehicle to protect all of the property of the Respondent from being stolen from a lot that had been the site of previous thefts from other impounded, locked automobiles, as well as to protect themselves from claims arising from any such thefts. The police did not unlock the glove compartment, but merely opened the lid. If the vehicle had been the object of a theft surely the thieves would not have stopped their efforts if the glove compartment lid was shut and unlocked. Thus the *Amicus* would

submit that the conduct of the Vermillion police was imminently reasonable under the circumstances.

In the case of *Harris v. United States,* 390 U.S. 234, 235 (1968):

> "Petitioner's automobile had been seen leaving the site of a robbery. The car was traced and petitioner was arrested as he was entering it, near his home . . ."

A cursory search was made of the car at that time, the petitioner was taken to the police station and the automobile impounded, arriving at the station over an hour after the petitioner. A regulation of the Police Department required the officer impounding the vehicle *"to search the vehicle thoroughly, to remove all valuables from it . . ."* (Emphasis supplied.) During this examination of the vehicle a registration card was discovered in plain view.

This Court stated in *Harris,* at page 236:

> "The sole question for our consideration is whether the officer discovered the registration card by means of an illegal search. We hold that he did not . . . The precise and detailed findings of the District Court, accepted by the Court of Appeals, were to the effect that the discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody. Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances."

In the instant case, the Supreme Court of South Dakota limits *Harris* to the "plain view" exception to the requirement of a warrant. 228 N.W.2d at 158. However, in *Cady v. Dombrowski, supra,* at pages 441 and 442, this Court cited *Harris* and *Cooper v. California,* 386 U.S. 58 (1967), as authority for the statement that:

> ". . . warrantless searches of vehicles by state officers have been sustained in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not nonexistent."

and cited the case of *United States v. Biswell,* 406 U.S. 311 (1972) as authority for the "plain view" search.

In *Cooper v. California, supra,* the petitioner was convicted of selling heroin to a police informer, and part of the evidence was seized by police, without a warrant, from the glove compartment of petitioner's impounded car one week after his arrest. Justice Black, for the Court, stated at page 61:

> ". . . But the question here is not whether the search was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment. Just as a search authorized by state law may be an unreasonable one under that amendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one. While it is true, as the lower court said, the "lawful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it," *ibid.*, the reason for and the nature of the custody may constitutionally justify the search . . ."

While this case is not *Cooper* in that the vehicle herein was not required to be forfeited under state law, the cases are quite similar in that the evidence was discovered during inventories of the vehicles. The reasonableness of the search herein is even more evident when compared to the search in *Cooper* which was made one full week after the owner was arrested on narcotics charges.

The *Amicus* would submit that the inventory herein was entirely proper as standard police procedure, and is legally

supported by *Cady v. Dombrowski, supra, Harris v. United States, supra* and *Cooper v. California, supra.* The *Amicus* does not believe that the inventory herein was a search, *Harris v. United States, supra,* at page 236. But even if it is deemed to be a search, the inventory was reasonable as required by the Fourth Amendment, and the decision of the Supreme Court of South Dakota must be reversed.

CONCLUSION

For all the foregoing, the *Amicus* respectfully prays this Court reverse the decision of the Supreme Court of South Dakota.

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NO. 75-76

IN THE

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AMICUS CURIAE BRIEF

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TABLE OF CONTENTS

Page

POINT I

THE SOUTH DAKOTA SUPREME COURT DID ERR IN HOLDING INADMISSIBLE EVIDENCE DISCOVERED DURING AN INVENTORY SEARCH. 1

TABLE OF AUTHORITIES

Cases

Bennett v. State, Okla. Cr., 507 P.2d 1252 (Ct. Cr. App.1973). 7

Cabbler v. Commonwealth, 212 Va. 520, 522, 184 S.E.2d 781, 782 (1971) 5

Cady v. Dombrowski, 413 U.S. 433, 37 L.Ed.2d 706, 93 S.Ct. 2523 (1973). 2, 4, 8

Capps v. State, 505 S.W.2d 727 (1974) 7

Chambers v. Maroney, 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970). 8

Cooper v. California, 386 U.S. 58, 17 L.Ed.2d 730, 87 S.Ct. 788 (1967). 4

Haerr v. United States, 240 F.2d 533 (5th Cir. 1957) 3

Harris v. United States, 390 U.S. 234, 19 L.Ed.2d 1067, 88 S.Ct. 992 (1968). 5, 6

Heffley v. State, 83 Nev. 100, 423 P.2d 666 (1967). 3, 4

In Re One 1965 Econoline, Etc., 109 Ariz. 433, 511 P.2d 168 (1973) 8

Knight v. State, Fla., 212 So.2d 900 (Ct. App. 1968) 8

Mackall v. State, 7 Md. App. 246, 255 A.2d 98 (Ct. Sp. App. 1969) 8

Manzanec v. Flannery, 176 Tenn. 125, 138 S.W.2d 441 (1940) 3

Nichols v. Commonwealth, Ky., 408 S.W.2d 189 (Ct. App. 1966) 3

People v. Sullivan, 29 N.Y.2d 69, 323 N.Y.S.2d 945, 272 N.E.2d 464 (Ct. App. 1971) 2, 5

Cases (Cont'd) **Page**

People v. Trusty, Colo., 516 P.2d 423 (1973) 7
Preston v. United States, 376 U.S. 364, 11 L.Ed.2d 777, 84 S.Ct. 881 (1964) 8
Roush v. State, Fla., 203 So.2d 632 (Ct. App. 1967) 8
State v. Gwinn, 301 A.2d 291 (Del. Supr. 1972) 7
State v. Montague, 73 Wash.2d 381, 438 P.2d 571 (1968) ... 8
State v. Olsen, 43 Wash.2d 726, 263 P.2d 824 (1953) 5, 8
State v. Opperman, 17 Cr. L. 2126, 228 N.W.2d 152 (S.D. 1975) 2, 4, 5, 6, 7, 8
State v. Undorf, 210 Kan. 1, 499 P.2d 1105 (1972) 8
State v. Vigil, 86 N.M. 388, 524 P.2d 1004 (Ct. App. 1974). .7,8
State v. Wallen, 185 Neb. 44, 173 N.W.2d 372 (1970) 2
State v. Wooten, 18 N.C. 269, 196 S.E.2d 603 (Ct. App. 1973) 3
State v. Woodall, 16 Ohio Misc. 226, 241 N.E. 755 (Ct. Com. Pl. 1968) 3
United States v. Clarke, 451 F.2d 584 (5th Cir. 1971) 3
United States v. Gerlatz, 350 F. Supp. 180 (U.S.D.C., E.D. Mich. 1972) 7
United States v. Gravitt, 484 F.2d 375 (5th Cir. 1973) 8
United States v. Pennington, 441 F.2d 241, *cert. den.*, 404 U.S. 854, 30 L.Ed.2d 94, 92 S.Ct. 97 (1971) 7
United States v. Robinson, 414 U.S. 218, 38 L.Ed.2d 427, 94 S.Ct. 467 (1973) 7

Constitutions

United States Constitution, Fourth Amendment 2, 3, 4, 8

Texts

Annot., 48 A.L.R. 3d 537 (1973) 5
44 L.W. 3257 (1975) 2
Ronald W. Szwajowski, University of Illinois Law Forum (1968) 6

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. 75–76

SOUTH DAKOTA,
Petitioner,

vs.

DONALD OPPERMAN,
Respondent.

AMICUS CURIAE BRIEF

POINT I

THE SOUTH DAKOTA SUPREME COURT DID ERR IN HOLDING INADMISSIBLE EVIDENCE DISCOVERED DURING AN INVENTORY SEARCH.

Following the impoundment of the automobile owned by Donald Opperman and pursuant to a standard procedure of the Vermillion, South Dakota Police Department, the contents of the vehicle were inventoried by a police officer. The officer's inventory extended into the closed console compartment where

he found marijuana. Opperman was convicted of possession of less than one ounce of marijuana. Defendant contended on appeal, as he did at trial, that the marijuana should have been suppressed because it was discovered during a search that violated the Fourth Amendment to the United States Constitution. The Supreme Court of South Dakota determined the inventory procedure to be an unreasonable search in violation of the Fourth Amendment and reversed the conviction of defendant-appellant Opperman. See *State v. Opperman*, 17 Cr. L. 2126, 228 N.W.2d 152 (S.D. 1975). The United States Supreme Court granted review to determine if the South Dakota Supreme Court erred in holding inadmissible the evidence found in the console of Opperman's vehicle. 44 L.W. 3257 (1975).

As a threshold issue the Supreme Court of South Dakota determined that an inventory is a search. The United States Supreme Court has expressly declined defining an inventory procedure as a search. *Cady v. Dombrowski*, 413 U.S. 433, 37 L.Ed.2d 706, 93 S.Ct. 2523 (1973). *People v. Sullivan*, 29 N.Y. 2d 69, 323, N.Y.S.2d 945, 272 N.E.2d 464 (Ct. App. 1971), a case square with *Opperman*, held that inventories are not searches. The defendant's car in *Sullivan* was impounded for a parking violation. A New York City Police Department regulation required that valuable property in an impounded automobile be recorded. The inventory of the contents of the vehicle revealed a loaded pistol for possession of which defendant was convicted. Contrary to the conclusion of the *Opperman* court, Judge Bergan, for the majority, opined that, "A 'search' is an intrusion under color of authority on an individual's 'vehicle', 'for the purpose of' seizing things (Tentative Draft No. 3, 1970, Art. 1, Sec. SS 1.01, subd. [1]). This is just what the inventory examination in the present case is not." In accord is *State v. Wallen*, 185 Neb. 44, 173 N.W.2d 372 (1970), in which the Nebraska Supreme Court refused to hold that an inventory is a search. The doctrine explicated in *Sullivan*, that certain procedures during which items are secured are not searches because their purpose is not to discover contraband or evidence, finds

federal foundation in *Haerr v. United States*, 240 F.2d 533 (5th Cir. 1957) and *United States v. Clarke*, 451 F.2d 584 (5th Cir. 1971). Circuit Judge Cameron defined a search:

> "A search implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action." *Haerr v. United States*, 240 F.2d at 535.

Several jurisdictions concur with the *Haerr* definition of a search; *State v. Wooten*, 18 N.C. 269, 196 S.E.2d 603 (Ct. App. 1973); *Nichols v. Commonwealth, Ky.*, 408 S.W.2d 189 (Ct. App. 1966); *Manzanec v. Flannery*, 176 Tenn. 125, 138 S.W.2d 441 (1940); *State v. Woodall*, 16 Ohio Misc. 226, 241 N.E. 755 (Ct. Com. Pl. 1968).

The purpose of the inventory conducted by the Vermillion police officer, indeed the purpose of all proper inventories, was to catalog and safeguard property of the vehicle owner. Contraband, "fruits" and evidence of crime were not sought to be discovered. If contraband and criminal evidence are the objects of the procedure it becomes a search within the purview and proscriptions of the Fourth Amendment.

By basing its finding that inventories are searches on the premise that holding otherwise "would lead to the encouragement of fishing expeditions, and a whittling away of Fourth Amendment protections" the South Dakota Justices failed to recognize that courts which have validated inventory procedure do not grant free reign to officers in the conduct of the procedure. *Heffley v. State*, 83 Nev. 100, 423 P.2d 666 (1967), aptly gives the general rule:

> "The police officer, when there is just cause, has a duty not only to impound a car from the public highway for its own protection, but also to inventory the contents so that they may be safeguarded for the owner. . . . *If, however, the policing conduct indicates that the intention is exploratory rather than inventory the fruits of that search are forbidden.* . . . Unfortunately, distinguishing inventory from exploration may prove to be ambitious

> and unprecise. We can only say that each case must be determined upon its own facts and circumstances. *Heffley v. State*, 83 Nev. at 104. [Emphasis added.]

Ample protection against "fishing expeditions" is provided by stringent application of the scrutinization suggested in *Heffley*. It appears to be an overreaction to proscribe inventory procedure altogether when a case-by-case examination of the conduct of officers using the inventory procedure can provide proper protection against encroachment of Fourth Amendment rights.

The South Dakota Supreme Court sought to distinguish recent United States Supreme Court decisions, the import of which is that inventory procedures are valid. In *Cooper v. California*, 386 U.S. 58, 17 L.Ed.2d 730, 87 S.Ct. 788 (1967), the petitioner's automobile was impounded and held for forfeiture proceedings. A week after the impoundment and four months before the forfeiture officers searched the vehicle and found evidence in the glove compartment subsequently used to help convict petitioner. The court held the warrantless search reasonable. The *Opperman* court sought to distinguish *Cooper* because "the vehicle here was not impounded for forfeiture action." By placing such emphasis on the reason for the car's impoundment the court skirts the important principle of *Cooper*, which is that a vehicle lawfully in the custody of police officials may be examined:

> "It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, *even for their own protection*, to search it. *Cooper v. California*, 386 U.S. at 62. [Emphasis supplied.]

The Supreme Court held in *Cady v. Dombrowski*, 413 U.S. 433, 37 L.Ed.2d 706, 93 S.Ct. 2523 (1973), that the warrantless intrusion by an officer into the trunk of the automobile of respondent Dombrowski was proper, emphasizing, first, that "the police had to exercise a form of custody or control" over respondent's vehicle and, second, that the procedure of entering the automobile's trunk was a standard measure to protect the

public from the possibility of harm. Again, the *Opperman* court, for purposes of distinguishing *Cady*, focused on the reason for the police assuming custody of the vehicle arguing that the car in *Cady* was a "nuisance" while the vehicle illegally parked in *Opperman* was not. Illegally parked cars do constitute an interference with public and private rights. *People v. Sullivan*, 29 N.Y.2d 69, 323 N.Y.S.2d 945, 272 N.E.2d 464 (Ct. App. 1971). However, the reason for the impoundment of an automobile is not the critical issue, far more important is whether custody is lawfully gained. The two essentials of an inventory are that it is not a subterfuge for a warrantless search and that the officials have lawful custody of the vehicle. Annot., 48 A.L.R.3d 537 (1973). *Cady* stressed that once lawful custody is assumed officers may examine the inside of the vehicle for the protection of the public. In *Cady* the police entered the vehicle of Dombrowski specifically to locate a weapon. The court approved the procedure because locating the weapon was for the public's protection. Protection of the public is the basis of inventory searches:

> "It has always been the public policy of the Commonwealth to preserve and protect the individual rights of citizens. Public policy also dictates that a citizen's rights and his property shall likewise be preserved and protected." *Cabbler v. Commonwealth*, 212 Va. 520, 522, 184 S.E.2d 781, 782 (1971).

Public safety is promoted by inventories, e.g., *State v. Olsen*, 43 Wash.2d 726, 263 P.2d 824 (1953), wherein a loaded pistol was found pursuant to an inventory.

The *Opperman* court distinguished the facts of *Harris v. United States*, 390 U.S. 234, 19 L.Ed.2d 1067, 88 S.Ct. 992 (1968), by asserting that the evidence seized in *Harris* was the result of a "plain view" discovery, while the marijuana found in *Opperman* was not in plain sight. *Harris* is, however, supportive of inventory procedures because it posits that police may utilize measures to protect property in their custody. If, pursuant to these protective measures, evidence or contraband is discovered in plain view it may be admitted. The propriety of

protective measures is precisely the issue presented in *Opperman*. The officers, to protect the property of Opperman, inventoried his vehicle and while doing so discovered marijuana. The protective steps followed in the instant inventory are certainly more necessary than those in *Harris;* the officer in *Harris* was merely securing the car against rain when evidence was discovered, the officer in *Opperman* was attempting to prevent the theft of items from the vehicle and in doing so found the marijuana.

The South Dakota Supreme Court did not discharge police officers from their duty to protect property inside an impounded vehicle, but limited the seizure of items to those in plain sight:

> "We hold that 'minimal interference' with a citizen's constitutional rights means that police inventory searches must be restricted to safeguarding those articles which are within plain view of the officer's vision." *State v. Opperman*, 228 N.W.2d at 158.

If it is necessary and proper that law enforcement officials safeguard items in "plain view" it is reasonable to extend the inventory to items inside the automobile not in plain sight. Ronald W. Szwajowski in the University of Illinois Law Forum (1968) states the reason why an inventory should extend to areas not in plain view:

> "If the purpose of the inventory is to record the valuables and other personal property in the car, it would seem unrealistic to limit the search to a superficial inspection of the vehicle. In view of the fact that a person who does carry valuables in his car will most properly place them in a safe and inconspicuous place as possible, the conscientious investigator will conduct as thorough a search as circumstances permit." R. Szwajowski, University of Illinois Law Forum at 407.

Courts have recognized that the only realistic method of protecting valuables inside impounded vehicles is to allow inventories to extend into hidden or closed areas of the

automobile in lawful police custody. *United States v. Gerlatz*, 350 F. Supp. 180 (U.S.D.C., E.D. Mich. 1972); *People v. Trusty, Colo.*, 516 P.2d 423 (1973); *Capps v. State*, 505 S.W.2d 727 (1974); *State v. Gwinn*, 301 A.2d 291 (Del. Supr. 1972). Opposite to the view expressed by the Supreme Court of South Dakota, glove compartments may properly be inventoried. *United States v. Pennington*, 441 F.2d 241, cert. den., 404 U.S. 854, 30 L.Ed.2d 94, 92 S.Ct. 97 (1971); *Bennett v. State, Okla. Cr.*, 507 P.2d 1252 (Ct. Cr. App. 1973).

By limiting the scope of an inventory to items in "plain view" the South Dakota Supreme Court makes it unclear whether it is validating the seizure of items in open sight of an officer standing outside the vehicle, or whether its opinion embraces the "plain view" doctrine, that incriminating matter inadvertently discovered by officials lawfully inside one's dwelling or automobile may be seized. If it is the purpose of the *Opperman* court to assert the latter view, the evidence was rightly admitted at trial since several courts have held that items inside closed compartments of vehicles are subject to "plain view" discovery during an inventory. *People v. Trusty, supra; Capps v. State, supra.*

Whether in the opinion of the South Dakota court an inventory is limited to the securing of property in plain view from within or without the vehicle, it does make clear that it is proper procedure to protect property inside the vehicle, therefore, it seems unrealistic to place an arbitrary barrier on the scope of the police protection. The rationale of safeguarding all property inside an automobile is underscored by decisions which hold that an inventory may include the contents of containers in a vehicle. A decision enunciating this principle is a New Mexico case, *State v. Vigil*, 86 N.M. 388, 524 P.2d 1004 (Ct. App. 1974). Defendant Vigil's car was taken into police custody following his arrest. During the subsequent inventory officers found a paper bag in the trunk. The bag was opened and found to contain marijuana. The Court of Appeals predicated its holding that the inventory of the bag was valid on *United States v. Robinson*, 414 U.S. 218, 38 L.Ed.2d 427, 94 S.Ct. 467

(1973), which provided that a "full search," not limited to items in plain view, of a person lawfully in the custody of the police is reasonable:

> "We see no reason why search should be more circumscribed where an arrestee's personal effects are involved when they, also, are in lawful custody." *State v. Vigil*, 86 N.M. at 391.

In accord that examination of tl e contents of containers inside vehicles is consistent with the purpose of the inventory are: *Roush v. State, Fla.*, 203 So.2d 632 (Ct. App. 1967); *Mackall v. State*, 7 Md. App. 246, 255 A.2d 98 (Ct. Sp. App. 1969); *State v. Montague*, 73 Wash.2d 381, 438 P.2d 571 (1968); *Knight v. State, Fla.*, 212 So.2d 900 (Ct. App. 1968); *In Re One 1965 Econoline, Etc.*, 109 Ariz. 433, 511 P.2d 168 (1973); *State v. Undorf*, 210 Kan. 1, 499 P.2d 1105 (1972).

The Fourth Amendment proscribes only those vehicular searches which are unreasonable. *Preston v. United States*, 376 U.S. 364, 11 L.Ed.2d 777, 84 S.Ct. 881 (1964). Assuming, arguendo, that an inventory procedure is a search, we conclude, as did the *Opperman* court, with an analysis of the reasonableness of the search conducted by the Vermillion Police Department. Initially, it is important to realize that automobiles have always been accorded less protection than persons and dwellings under the Fourth Amendment. See *Cady v. Dombrowski*, 413 U.S. 433, 37 L.Ed.2d 706, 93 S.Ct. 2523 (1973); *Chambers v. Maroney*, 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970). An inventory search like that conducted by the Vermillion police officer is done to protect the property rights of citizens and to protect the police against claims of property loss. *United States v. Gravitt*, 484 F.2d 375 (5th Cir. 1973). An ancillary benefit is that the public safety is safeguarded. See *State v. Olsen*, 43 Wash.2d 726, 263 P.2d 824 (1953). The South Dakota court's contention that the removal of items in plain view and the closing of windows and the locking of doors satisfies the "slight duty of care" of the police may be answered by the consideration that it is certainly reasonable to believe that any competent thief will ransack likely hiding

areas of a car such as compartments and those areas not in plain view. The minimal measures advanced by the South Dakota court may satisfy the "slight duty of care" of South Dakota police but they do not reasonably protect citizens' property. It is apparent that to fully safeguard the effects left inside vehicles which are in lawful custody police officials must have the authority to conduct a detailed inventory of the vehicle.

Therefore, the Court is urged to approve the inventory procedure proscribed by the South Dakota Supreme Court and hold that the evidence discovered pursuant to the inventory was lawfully admitted.

Respectfully submitted,

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE INSTANTER

The Illinois Public Defender Association respectfully requests leave to file a brief as *amicus curiae* instanter.

INTEREST OF THE AMICUS

The Illinois Public Defender Association is an association of attorneys engaged in the defense of indigent clients in criminal cases in Illinois. The question presented in this case, the constitutionality of automobile inventory searches, substantially affects the right of Illinois citizens, including the indigent, to be free of unlawful searches and seizures.

Members of the Association represent the defendant in *People* v. *Clark,* Docket No. 48085, pending in the Illinois Supreme Court, in which the constitutionality of automobile inventories is presented. This Court's decision in the present case will profoundly affect the outcome in *Clark.*

The Association believes that in addition to the factual discussion and review of this Court's prior holdings contained in respondent's brief, it is important to examine critically the policy considerations which have been advanced in support of automobile inventory searches. The brief of *amicus* is addressed to these considerations.

REASON FOR ASKING LEAVE TO FILE INSTANTER

The Illinois Public Defender Association respectfully represents that although this Court granted certiorari in this case on November 3, 1975, and respondent filed a brief on the merits on January 12, 1976 the interest of the Public Defenders' Association became compelling only on January 23, 1976, when the Supreme Court of Illinois agreed to consider the constitutionality of automobile inventory searches in *People* v. *Clark,* Docket No. 48085. The *Clark* case, which will significantly affect the rights of the indigent in Illinois, will be heavily influenced, and possibly determined, by this Court's decision in the present case.

Attorneys for the Public Defender Association promptly contacted counsel for the respondent seeking copies of the briefs filed in this Court. These briefs were received in mid-February and the Association thereupon determined

that its interests were not completely served by respondent's brief. The Association has diligently attempted to prepare the attached brief of *amicus curiae* as quickly as possible to avoid inconvenience to this Court.

Wherefore, the Illinois Public Defender Association asks that leave be allowed to file the attached brief of *amicus curiae* instanter.

Respectfully submitted,

ILLINOIS PUBLIC DEFENDER ASSOCIATION

By: .....

Counsel for Amicus Curiae

IN THE

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OCTOBER TERM, 1975

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BRIEF OF AMICUS CURIAE, ILLINOIS PUBLIC DEFENDER ASSOCIATION, IN SUPPORT OF THE RESPONDENT

ARGUMENT

ABSENT EXTRAORDINARY CIRCUMSTANCES, POLICE OFFICERS ARE PROHIBITED BY THE FOURTH AMENDMENT FROM SEARCHING AN IMPOUNDED AUTOMOBILE IN ORDER TO INVENTORY ITS CONTENTS.

Amicus asks this Court to reject the position that an automobile impounded by the police must be thoroughly searched and inventoried, and to reject as well the argument that the mere administrative convenience of the po-

lice may take precedence over the constitutionally guaranteed right to freedom from unlawful search and seizure. We suggest that this Court recognize instead the rule that, absent extraordinary circumstances, police officers are prohibited by the Fourth and Fourteenth Amendments from searching an impounded automobile to conduct an inventory.

The rule we request has received increasingly frequent acceptance since its adoption in *United States* v. *Lawson,* 487 F. 2d 468 (8th Cir. 1973). See *State* v. *Boster,* 539 P. 2d 294 (Kan. 1975); *State* v. *Bradshaw,* 41 Ohio App. 2d 50, 322 N.E. 2d 313 (1974); *Commonwealth* v. *Dawson,* ..... S.W. 2d ..... (No. 74-887, Ky. 1975); *United States* v. *Chadwick,* 393 F. Supp. 763 (D. Mass. 1975). Even before the ruling in *Lawson,* the Supreme Court of California found the justifications underlying the inventory concept to be without merit, *Mozzetti* v. *Superior Court,* 4 Cal. 3d 699, 484 P. 2d 84 (1971). Although inventory searches have long been a source of conflicting opinion,[1] the reasoning of the courts in *Lawson* and *Mozzetti* is correct and provides the proper balance between the citizens' right to freedom from improper searches, on the one hand, and the proper functioning of the police, on the other.

Two theories have traditionally been advanced to justify the automobile inventory search; first that an inventory protects the property of the owner of the impounded vehicle, and second that it protects the police from false charges of theft. Neither justification deserves the approval of this Court.

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[1] 48 ALR 3d 537; "Warrantless Searches and Seizures of Automobiles," 87 Harv. L. R. 835, 848 (1974).

The suggestion that protection of the owner's property justifies a search stands the Fourth Amendment on its head. Absent a specific request for inventory by the owner of an impounded car, it is peculiar, to say the least, to suggest that the police can foist upon him an unsolicited form of protection that involves the opening of his car doors and the inspection of his effects. When a citizen leaves a car on the street, he rolls up his windows, locks his doors, and pockets his key. That is reasonable protection. By the same token, the police, when removing a car, may seal it and guard the keys for the owner. Where a car is left, as Mr. Opperman's car was, locked and unattended for hours, the owner's determination of the necessary security for his property must be deemed sufficient. Where the owner is present at the time of impoundment, his preference should be ascertained, and should govern. Neither the police nor the courts may trade away the right to freedom from unreasonable searches on the speculation that a car owner would prefer different form of protection.

The alternative defense of the inventory search, that it protects the police from unfounded theft charges, is highly speculative as well as legally and logically unsound.

Amicus is not aware of any evidence that inventory searches do, in fact, protect the police from false claims. The Supreme Court of California prohibited the inventory search in 1971, yet neither the petitioner nor *amici* in support thereof have presented any meaningful statistics to support the position that fraudulent claims in California, or other areas where inventory searches have been prohibited, have become a problem to law enforcement officials.

Logic suggests, on the contrary, that the taking of an inventory will not discourage the filing of false claims.

Anyone dishonest enough to bring a false claim against the police will be willing to allege a false inventory. Far from preventing such claims, the inventory procedure may well have the opposite effect since the possibility of theft is more likely to suggest itself to an owner who knows his automobile has been entered than to one who knows his automobile to have been secured only from the outside.

Furthermore, the inventory is of little use in the event that someone does decide to sue the police. It is hardly conclusive in a civil action for loss of property from the vehicle since the article might have been stolen before the inventory or simply omitted from the inventory. The inventory is merely a self-serving document prepared by the police and can hardly be binding upon a claimant. It is doubtful if an inventory, which lists the property found in the vehicle, is of any more use than a signed document by the police stating that the vehicle was not searched, nothing was removed, and the vehicle was locked. Police officials can defend themselves by testifying truthfully in court, where the plaintiff bears the burden of proof. There is no reason to elevate a minimal and speculative danger into a justification for broadly expanded search powers.

On neither of its asserted justifications does the inventory search deserve the approval of this Court. It may be, as was suggested in *Lawson*, that exceptions might be made in an atypical case. Items of obvious value, for example, lying in plain view, might be locked in the trunk or kept at the police station if the car, because of damage, could not be locked. To a limited extent, each case may have to be determined on its own facts.

The soundest rule, however, is to recognize that under normal circumstances the inspection and inventory of the

contents of an impounded automobile is impermissible under the Fourth and Fourteenth Amendments. If the owner is present when his auto is impounded, his preference should be followed. If he is not, then the duty of the police extends no further than locking the car and holding the keys for the owner. Any intrusion into closed compartments, as was done in this case, is a constitutional violation.

CONCLUSION

It is neither wise nor necessary to propound a *per se* rule approving or forbidding all inventories of impounded automobiles. The proper balance must be struck based on the facts of each case. *Amicus* submits, however, that it is only in exceptional circumstances that an inventory search can be constitutionally permissible.

The decision of the Supreme Court of South Dakota represents the correct view of the law, and should be affirmed.

Respectfully submitted,

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